(22, 91.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 248.

WELLS, FARGO AND COMPANY AND G. H. PITTMAN AND E. J. RILEY, PLAINTIFFS IN ERROR,

vs.

NEIMAN-MARCUS COMPANY.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 27, 1911.

1 THE STATE OF TEXAS,
County of Dallas:

Caption.

At a term of the County Court of Dallas County, at Law, begun and holden at Dallas, within and for the County of Dallas, before the Honorable W. M. Holland, Judge thereof presiding, beginning on the 4th day of January, A. D. 1909, and ending on the 27th day of February, A. D. 1909, the following Cause came on for trial, to-wit:

No. 14918.

NEIMAN-MARCUS COMPANY
vs.
WELLS, FARGO & COMPANY.

THE STATE OF TEXAS,
County of Dallas:

No. 14918.

NEIMAN-MARCUS COMPANY
vs.
WELLS, FARGO & COMPANY.

Plaintiff's Original Petition.

Filed Dec. 19, 1907.

To the Honorable Judge of the County Court of said County, at Law:

Neiman-Marcus Company, a corporation duly incorporated, having its principal office in Dallas, Dallas County, Texas, brings this suit, complaining of Wells, Fargo & Company, a corporation duly incorporated, having an office and local office in Dallas County Texas, viz: Edward J. Riley, upon whom citation may be served, and for cause of action, plaintiff alleges:

1. That defendant is a common carrier of merchandise for hire, engaged in carrying on what is known as an express business, wherein it undertakes to receive safely and promptly transport and deliver articles of merchandise from points to points in the United States; that it has offices and lines of communication in the City of New York, State of New York, and the City of Dallas, State of Texas, besides other points; that on or about August 28, 1907, A. Jacob-
2 son & Bro., of New York City, sold to plaintiff and delivered to defendant for transportation and delivery to plaintiff at Dallas, Texas, one set of special Russian Sable Furs of the reasonable value of Five Hundred ($500.00) Dollars; that defendant accepted said articles, and as a carrier became bound safely to carry same and

promised and agreed for a valuable consideration, to transport the same expeditiously and safely and deliver the same to plaintiff in good order at Dallas, Texas; became bound to exercise due care in transporting same; that in violation of its contract and duty in the premises the defendant wholly failed to so transport and deliver said merchandise and has never delivered nor tendered same to plaintiff nor otherwise excused their non-delivery; that it negligently and carelessly handled and carried same; that it has converted the same and upon demand made, has failed and refused, and still fails and refuses, to account to plaintiff for same, to plaintiff's damage in the sum of Five Hundred ($500.00) Dollars.

2. Wherefore, premises considered, plaintiff prays for citation against defendant in terms of the law, and that on final hearing, it have judgment for its damages, costs of suit and general relief.

RHODES S. BAKER,
Attorney for Plaintiff.

Filed Dec. 19, 1907, Jack M. Gaston, Clerk County Court at Law, By Fred Patrick, Deputy.

In the County Court at Law in and for Dallas County, Texas.

No. 14918.

NEIMAN-MARCUS COMPANY
vs.
WELLS, FARGO & COMPANY.

Defendant's First Amended Original Answer.

Filed Jan. 6, 1907.

Now comes the defendant in the above entitled and numbered cause, and leave of the Court first had and obtained, files herein its first amended original answer in lieu of its original answer filed here-
tofore on, to-wit, February 8th, 1908, and for answer defend-
3 ant represents:

1st.

That it demurs generally to plaintiff's petition and says that the same is insufficient in law and states no cause of action against this defendant, wherefore defendant prays judgment.

2nd.

Defendant denies all and singular the allegations in plaintiff's petition contained, demands strict proof of the same and of this puts itself upon the country.

3rd.

For further and special answer in this behalf defendant represents to the Court that heretofore on, to-wit, August 28th, 1907, there was

delivered to this defendant, by A. Jacobson & Bro., a firm of merchants doing business in the City of New York, the package for the value of which plaintiff sues herein, and that said delivery was effected in the following manner:

Said shippers, A. Jacobson & Bro., were merchants in the City of New York, State of New York, and were thoroughly familiar with the rules and regulations of express companies in regard to carriage of packages entrusted to said express companies and from time to time shipped large quantities of merchandise by express from their place of business to various points in the United States. That said A. Jacobson & Bro. kept on hand at their place of business, what is known as an express company's receipt book, in which they listed each and every package of merchandise delivered by them to this defendant for shipment; that it was usual and customary for said A. Jacobson & Bro., the shippers, through their agents and representatives to fill out the receipt contained in said book, and when the driver of this defendant would call at their place of business for the purpose of accepting said package for transportation over the lines of
4 this defendant, said book was presented to him with the receipts already made out therein and his signature taken as a receipt for each package therein described. That upon the occasion of the shipment of the package in question, defendant's driver called at the place of business of said A. Jacobson & Bro., and a package was there delivered to him, and said book with the receipt already filled out by the agents and representatives of the shippers, was presented to said driver for his signature, and his signature obtained to said receipt. Defendant represents that at the time said package was delivered to it that same was securely packed in a box and wrapped with heavy paper and bound with a strong twine, and the contents of said package was thereby wholly undisclosed, and this defendant could not, from observation, ascertain the kind or character of shipment or the class, quality or value of same.

4th.

Defendant attaches hereto a copy of the written receipt or contract of shipment which was entered into with the shippers, which is made a part hereof and defendant represents that in said contract it is provided, "That in no event shall the defendant be held liable beyond the sum of $50.00 at not exceeding which sum the property is hereby valued, unless a different value is herein above stated." And defendant represents to the Court that in said receipt prepared by said shippers as aforesaid no valuation whatever was declared upon said package, except the stipulation in said receipt, and that this defendant accepted the same in good faith, believing the same to be of the value of $50.00 or less, and the same was shipped out over this defendant's lines and a charge made for such transportation based upon a package of the value of $50.00.

5th.

Defendant further represents to the Court that it was and is usual and customary with all express companies operating within

5 the United States, and is usual and customary with this defendant company, that where no valuation is declared upon a package by a shipper, to estimate the value thereof as being $50.00 or less, and is usual and customary for defendant company, and all other express companies, as aforesaid to base their charges of transportation, where a package is delivered without its value being declared by the shipper, upon an estimated value of $50.00; that said rule and custom was well known to the shippers, A. Jacobson & Bro., at the time the package in question was delivered to this defendant for transportation.

6th.

Defendant further represents to the Court that said shipment constituted an interstate shipment, in that it originated at a point within the State of New York, to-wit, New York City, and was destined to a point in the state of Texas, to-wit, Dallas, Texas.

And defendant represents to the Court that at the time it accepted said package for carriage between said points, that there was in force a legally established rate between said points, that there was in force defendant had promulgated, published, posted and filed with the Interstate Commerce Commission as required by law, tariffs, setting out and fixing rates to be charged by this defendant for the carriage of merchandise packages of the kind, character, quality and value of that delivered to this defendant as aforesaid. And this defendant represents to the Court that under said tariffs aforesaid, it was authorized to charge and did charge for the transportation of said package of the weight of six and a quarter pounds with a valuation fixed thereon at the sum of $50.00, a rate of $1.00 between said points. And defendant represents to the Court that had the actual value of said package been known to the defendant, or had the shippers declared the actual value thereon to be the sum of $500.00, as is claimed by plaintiff herein, this defendant, under the

6 legally established tariffs aforesaid, would have been entitled to charge for the transportation of said package between said points, an additional sum, based upon the excessive value of said package over and above said $50.00 of, to-wit, fifteen cents for each $100.00 value or fraction thereof. And had said shippers declared the value of said package to be the sum of $500.00, this defendant would have been entitled, under said tariffs, to an additional charge of the sum, to-wit, of 75 cents, in addition to that agreed to be paid by the shippers.

7th.

Defendant represents to the Court that it was well known to said shippers that where the value of the package shipped over the defendant's lines was in excess of $50.00, that an additional charge is made therefor to the shipper, based upon such excessive value over and above said $50.00. And this defendant represents to the Court that said shippers did knowingly and wilfully falsely bill and classify said package and did misrepresent to this defendant the value of said package, and did by concealment prevent this defendant from knowing the value of said package, whereby said shippers did obtain

transportation for such property at less than the regular rates then established and in force on this defendant's line of transportation, all of which was unknown to this defendant, and which was done without the knowledge of this defendant as to the value of said goods.

8th.

Defendant represents to the Court that had the shippers, A. Jacobson & Bro., notified this defendant of the character of the shipment in question and of the value thereof, that this defendant would have made an additional charge for the transportation of said package as aforesaid and in consideration of said additional charge would
7 have given the said package an extra service, in that this defendant would have billed the same out under a special billing as a valuable shipment and would have required each of its agents, representatives, servants and messengers through whose hands said packages passed en route to give a receipt to the preceding agent, representative, servant or messenger for said package when the same was delivered to him, and to require and accept a receipt from the agent, servant, representative or messenger to whom he should deliver said package, and that in addition to this said package would have been separated from what is known as ordinary express matter of the value of $50.00 or less, and would have been placed where each of the messengers in charge of said package en route would have kept a special watch over the same, and given it special protection and care. That had said shippers declared the value of said package to be of the sum of $500.00, as is claimed by plaintiff, this defendant would have given said package the extra service above set out, and the same would not or could not likely have been lost by this defendant in transportation. Defendant further represents that each of the messengers through whose hand said package would have passed, if the valuation had been declared to be of the sum of $500.00, as claimed by plaintiff, would have been personally responsible to this defendant for the safety, protection and delivery of said package, and this defendant, under these conditions, could have traced said package and found which of its messengers were responsible for the loss thereof, if the same was lost, which is denied, and could have compelled said messenger to account to this defendant for such loss, if any, and this defendant would not, itself, have suffered any loss under such conditions. Wherefore, defendant says that such acts on the part of the shippers A. Jacobson & Bro. in falsely billing said package and in falsely declaring the value thereof to be the sum of $50, and in concealing from this defendant the actual value of said package perpetrated a fraud upon this defendant whereby said plaintiff herein should be estopped from hold-
8 ing this defendant responsible for the loss, if any, occasioned to said shipment.

9th.

Defendant represents to the Court that if at this time it should voluntarily recognized in settlement with the plaintiff, or should be required by the court to pay to the plaintiff, a sum of money greater

than the value of the package which formed the basis for the rate charged by defendant for transporting said package from New York to Dallas, that this defendant would be guilty of directly or indirectly by special rate, rebate, drawback, or other device of charging, collecting, and receiving from plaintiff herein a less compensation for the services rendered in transporting said package, than it charges, demands, collects and receives from other persons for doing them a like and contemporaneous service in the transportation of merchandise of like kind and value of the package claimed to have been lost by plaintiff. And this defendant would be guilty of giving to plaintiff herein an undue and unreasonable preference and advantage over other persons or corporations shipping merchandise over the lines of this defendant.

10th.

Defendant further represents that should this defendant voluntarily pay to plaintiff herein or should the court require this defendant to pay to the plaintiff a greater sum of money than the value of said package, which formed the basis for the rate of transportation, that this defendant would be guilty of charging, demanding, collecting and receiving a less or different compensation for such transportation of said property between the points heretofore mentioned than the rates, fares and charges, which are specified in tariffs duly promulgated, published, posted and filed with the Interstate Commerce Commission as required by law, and in full force and effect at the time it accepted said package for shipment, and would result
9 in requiring and forcing this defendant to refund and remit
to the plaintiff herein a portion of the rates, fares and charges, and to extend to plaintiff privileges contrary to the provisions and stipulations in said tariffs contained.

11th.

Defendant further represents to the Court that should it voluntarily recognize in settlement with the plaintiff, or should the court force defendant to pay to the plaintiff a sum greater than the value of the goods which formed a basis for the rate, that said act committed voluntarily by the defendant would be an offense against the criminal laws of the United States, and if performed under a judgment of this Honorable Court, would, in effect, result in the Court's requiring the defendant to do an act, which if committed voluntarily, would be an offense against the criminal laws of the United States. And defendant further represents that should the shippers or plaintiff accept or receive a greater sum of money than that which formed the basis for the rate of transportation, that the same would be a rebate, concession and discrimination in regard to said shipment, in that said shipment would be carried at a less rate than that named in the tariffs published, posted and filed as required by law and in force at the time said shipment was received, and thereby the plaintiff would receive an advantage over other persons or shippers making a shipment of like kind and character.

12th.

Defendant represents to the Court that if it should be held that defendant did lose said package or convert the same as is claimed by plaintiff, but which is denied by this defendant, then defendant represents to the Court that it should not and could not be legally held liable at all for said package by reason of the premises herein, but should the court hold that this defendant is liable to the plaintiff,
then defendant represents that the liability if any, should be
10 limited to $50.00 as provided in said contract of shipment,
which $50.00 has heretofore been tendered to plaintiff.

Wherefore, defendant prays that upon the final hearing hereof, it go hence without day and recover of and from plaintiff herein any and all costs in this behalf expended, and for general relief.

ALEXANDER & HOGSETT,
Attorneys for Defendant, Wells, Fargo Express Co.

Not Negotiable. Read the Conditions of this Receipt.

Wells, Fargo & Co. Express.

Received from A. Jacobson & Bro., the following articles, which Wells Fargo & Company, a corporation hereby undertakes to forward to its agency nearest destination, but only upon the following conditions: The liability of Wells Fargo & Co., shall be at all times only that of a forwarder and in no event shall it be liable for loss of or damage to said property caused by or resulting from the same being improperly packed, secured or addressed; nor by or from any act of the law, or of a person acting as an officer of the law, whether acting with or without lawful process, warrant or authority, nor for loss of or damage to fragile articles, unless plainly marked as such; nor for loss of or damage to articles consisting of or contained in glass; nor shall said company be liable for any loss of or damage to said property in any event for any cause whatever unless said loss or damage shall be proved to have been caused by or to have resulted from the fraud or gross negligence of said company or its servants; nor in any event or for any cause whatever unless said loss or damage shall be proved to have been caused by or to have resulted from the fraud or gross negligence of said company or its servants; nor in any event shall said company be held liable beyond the sum
of Fifty Dollars, at not exceeding which sum the said prop-
11 erty is hereby valued, unless a different value is hereinabove
stated; nor in any event shall said company be held liable
for any loss of or damage to said property unless written claim be made therefor to said company within Ninety Days from this date. In respect to C. O. D. goods, if the amount to be collected from the consignee on delivery is not paid within thirty days from this date, Wells, Fargo & Company may at its option return the same to the Consignor, who shall pay the charges for transportation both ways. Wells Fargo & Co., is not required to make free delivery of said property beyond its office at any station where no free delivery

service is maintained by said Company, nor at any station where such free delivery service is maintained beyond the delivery limits established by said company at the date hereof, unless otherwise herein agreed and an additional compensation paid therefor. All of the stipulations and conditions in this receipt shall extend to, and inure to the benefit of, each and every person or company to whom this company may entrust to deliver the above described property for transportation storage, or delivery. The party accepting this Receipt thereby agrees to its conditions.

Date.	No. articles.	Value.	C. O. D.	Consignee.	Destination.
8/28/07.	1 pkg. 212227.			Nieman-Marcus Co.	Dallas, Tex.

Receipted by
J. MANNING.

Copy.
Filed Jan. 6, 1909, Jack M. Gaston, Clerk County Court at Law, By W. B. Walden, Deputy.

In the County Court at Law in and for Dallas Co., Texas.

14918.

NEIMAN-MARCUS CO.
vs.
WELLS-FARGO & CO.

Statement of the Facts.

Filed Mar. 15, 1909.

12 Be it remembered that upon the trial of the above entitled and numbered cause the following evidence was adduced, which formed the basis for the judgment of the Court.

Plaintiff offered in evidence the deposition of DAVID FISCHER.

Deposition of David Fischer.

To the direct interrogatories witness answered as follows: My name is David Fischer. I am twenty years of age. I reside at 211 West 115th Street Borough of Manhattan, City of New York, and I am employed as shipping clerk by the firm of A. Jacobson & Brother at 160 Fifth Avenue, Borough of Manhattan, City of New York. I was in the employ of the same firm on the 28th day of August, 1907, and was employed in the same capacity by the above firm at that time. I had nothing to do with the actual sale of the furs in question, but the furs were given to me to wrap the same and prepare the same for shipment by express and to ship the same. The furs that I wrapped into the package consisted of a sable fur muff and a sable fur scarf, composing a set. Our shipping number for this package is # 21227. The weight was 6¼ lbs. It was delivered to the agent for the Express Company by Robert Perless, a boy

under my charge, in the shipping department of A. Jacobson & Bro. in my presence. When the furs referred to were delivered to the Express Company a receipt was taken covering the shipment. This receipt is attached to this deposition and marked by the Commissioner Exhibit B. I know the signature in the right hand column of this paper to be that of J. Manning, the same man who has many times called at this place of business for packages for Wells-Fargo & Company and receipted for same. On all these occasions he wore the Wells-Fargo cap. No negotiations at all were had with the agent of the Express Company over the contract of shipment. No inquiry was made of him or by him and no representation concerning the rate of shipment. I have no recollection of any inquiry or representation having been made concerning the value of the package. It is not true that the Express Company's
13 Agent asked the value of the shipment in question and that the value was falsely stated. Nothing was said whatever about limiting the liability of the Express Company to $50.00 on account of this shipment. Nothing was said at all about the different schedule- of charges for shipments valued at $50.00 and under from shipments valued at greater sums. I have no knowledge of the market value of Russian Sable Furs. I have no knowledge of the value in New York nor in Texas of the furs in question.

To the cross-interrogatories the witness FISCHER answered as follows:

I have been in the employ of A. Jacobson & Brother in New York City for five years. I began work as an errand boy and was promoted to assistant shipping clerk and prior to August 28, 1907, became shipping clerk, which position I occupied on that date. I personally prepared this package for shipment and placed this package aside for delivery to Wells-Fargo & Company. It was delivered to the agent for this company by Robert Perless. I answered the direct interrogatories from my own memory, but have produced the receipt in answer to the direct interrogatory # 4 and same has been annexed to this deposition and marked Exhibit B. I have an independent recollection of the delivery of this package, but same is refreshed and borne out by the receipt Exhibit B. I have never been engaged in purchasing and selling furs. I do not know whether a person who had not had considerable experience in buying and selling furs and in the handling of the same would be able to tell what their value was by an inspection of them, and I do not know what amount of experience it would take in order to be able to judge the value of furs. This package of furs was packed in what we call a set box. This is a paste-board box with a partition in it, one side being designed for the muff and the other side for the scarf. The fur pieces were separately wrapped in tissue paper and placed in their respective apartments of the box. The entire box was
14 then wrapped in wrapping paper and a twine tied about it. The weight of the package was 6¼ pounds. I have an independent recollection of the marking of this package. I personally marked it as follows: "Neiman-Marcus Co., Dallas, Texas, W. F. X.

#21227." The Letters W. F. X. mean Wells-Fargo Express, the figures representing our shipping number. It is true that the firm of A. Jacobson Brother keep on hand a Wells, Fargo & Company book containing express receipts and that when a package is to be shipped our Company fills out the blank form of receipt in this book and the driver of the Express Company calls at our place of business and when receiving said package receipts the book in a column opposite the entries made out for said package in said book. There is nothing printed on the inside cover of this receipt book of the Wells, Fargo & Company in our place of business. The printed portion of the receipt, Exhibit B, is the same as each of the receipts in the book. The original receipt called for is attached to this deposition and marked Exhibit B. We shipped possibly several thousand packages during the time that I have been working for A. Jacobson & Brother, but we shipped only an average of about one package per week by Wells-Fargo & Company and this was the only one shipped on that date by this Company. I have had about four years' experience in shipping packages of merchandise by express. This package was sent "collect." I know from my individual recollection and from the letter "C" on the receipt exhibited, being in the column heated C. O. D. I did not know at the time this package was delivered to the defendant express company that if the same was marked as valued at $400.00 that the defendant Express Company would charge a higher rate for carrying the same than it would if no valuation at all was declared thereon.

16th Cross-interrogatory. You knew it to be a fact, did you not, at the time this package was delivered to the defendant Ex-
15 press Company, that if no value was declared on the same or entered in the receipt, that the same would be carried by the defendant Express Company under a rate applying to a package of a value of $50.00 or less. If this is not a fact, then state what your information in regard to said rates was at that time.

Answer to 16th Cross-Interrogatory: "I did not know any such fact as is stated in this question. I had no information whatever in regard to the rates at that time." There was pasted on the outside of the package a paster, a duplicate of which is hereto annexed and marked Exhibit C, showing that the package came from our concern, furriers. The contents of this package could not be examined without unwrapping the same. The furs were securely wrapped and packed for shipment. There were no other packages shipped by A. Jacobson & Brother to Neiman-Marcus Company during the period named, that is, between Aug. 26th, and Aug. 30th, 1907. I have never endeavored to ascertain the Express Company's rates on packages of different values.

Plaintiff offered in evidence the deposition of Abraham Jacobson.

Deposition of Abraham Jacobson.

In answer to the direct interrogatories witness Abraham Jacobson testified: I am a member of the partnership of A. Jacobson &

Brother, Wholesale Dealers in Furs, at 160 Fifth Avenue, Borough of Manhattan, City of New York. During the early part of July, 1907, Mr. and Mrs. Neiman called at out place of business and among other things, bought for the Neiman-Marcus Company a special Russian Sable set consisting of a muff and a scarf. These were specials made up of selected skins. The set was made up and was delivered to David Fischer, the head of our shipping department, for shipment. I know nothing about what occurred between the shipping clerk and the Express Company's agent when the furs were delivered. I have been engaged in the purchase and sale of furs of all kinds for a period of more than twenty five years, during which time
16 I have had my place of business in the City of New York.
During all this time I have bought and sold Russian Sable furs and during all this time I have manufactured Russian Sable furs into muffs, scarfs and other articles of apparel. I have been, during all this time, thoroughly familiar with the market values of all furs, including Russian Sable furs, both in New York City and in other points throughout the United States. I saw the set of furs in question in this case when they were made up and personally chose the fur skins that were used in making up the said set. I know the value in New York of the set of furs above referred to. The value was at le-st $400.00 net at wholesale. I know the value in Dallas, Texas, of the set of furs referred to. The value was considerably upwards of the wholesale value of $400.00 above stated.

In ans-er to cross interrogatories the witness, Jacobson, testified: I have been engaged in the purchasing and selling of furs for more than twenty-five years. A person would not be able to tell the value of furs by inspecting same unless he had considerable experience in handling same.

The 15th and 16th cross interrogatories to said witness are as follows:

15th Cross-interrogatory. At the time this package was delivered to the defendant Express Company you knew, did you not, that if the same was marked as valued at $400.00 that the defendant Express Company would charge a higher rate for carrying the same than it would if no valuation at all was declared thereon?

16th Cross-interrogatory. You knew it to be a fact, did you not, at the time this package was delivered to the defendant Express Company, that if no value was declared on the same or entered in the receipt that the same would be carried by the defendant Express Company under a rate applying to a package of the value of $50. or less? If this is not a fact, then state what your information in regard to said rates was at that time.

17 Answer of the witness to the 15th and 16th cross-interrogatories: At and prior to August 28, 1907, I knew the facts stated in these interrogatories.

Plaintiff offered in evidence the "Sticker" attached to the Deposition of David Fischer and marked Exhibit C, which is as follows

From

A. Jacobson & Bro.,
Furriers,
160 Fifth Ave., N. W. Cor. 21st St.,

New York.

....
To ....
....
Via.............. ....
No...............
....

Testimony of A. L. Neiman.

A. L. NIEMAN, a witness for plaintiff, testified as follows: I am an officer of Neiman-Marcus Company and was such on and prior to August 28, 1907. At the time the package of furs, for the value of which this suit was brought, was shipped by Wells-Fargo & Company from A. Jacobson & Brother of New York City, State of New York, consigned to Neiman-Marcus Company, Dallas, Texas, it was my duty to receive and receipt for express packages tendered to Neiman-Marcus Company by Wells-Fargo Express Company and other express companies, and I know what packages were received by Neiman-Marcus Company from said express companies subsequent to said date of August 28, 1907. The Neiman-Marcus Company was never tendered and never received from Wells-Fargo Express Company, nor anyone else, the package of furs in question.

Original Receipt from Defendant's Driver.

Defendant offered in evidence the original receipt taken by A. Jacobson & Brother from defendant's driver in New York, which said receipt was attached to the deposition of David Fischer and marked Exhibit B. for identification, said receipt being as follows:

18 Wells Fargo & Co., Express.

Read the Conditions of this Receipt.

Not Negotiable.

Received from A. Jacobson & Bro., the following articles, Which Wells Fargo & Company a corporation hereby undertakes to forward to its agency nearest destination, but only upon the following conditions: The liability of Wells Fargo & Co., shall be at all times only that of a forwarder, and in no event shall it be liable for loss of or

damage to said property caused by or resulting from the same being improperly packed, secured or addressed; nor by or from any act of the law, or of a person acting as an officer of the law, whether acting with or without lawful process, warrant or authority; nor for loss of or damage to fragile articles, unless plainly marked as such nor for loss of or damage to articles consisting of or contained in glass; nor shall said company be liable for any loss or damage to said property in any event or for any cause whatever unless said loss or damage shall be proved to have been caused by or to have resulted from the fraud or gross negligence of said company or its servants; nor in any event shall said company be held liable beyond the sum of Fifty Dollars, at not exceeding which sum said property is hereby valued, unless a different value is hereinabove stated; nor in any event shall said company be held liable for any loss of or damage to said property unless written claim be made therefor to said company within Ninety Days from this date. In respect to C. O. D. goods, if the amount be collected from the consignee on delivery is not paid within thirty days from this date, Wells Fargo & Co. may at its option return the same to the consignor, who shall pay the charges for transportation both ways. Wells Fargo & Co., is not required to make free delivery of said property beyond its office at any station where no free delivery service is maintained by said company, nor at any station where such free delivery service is maintained be-
19 yond the delivery limits established by said Company at the date hereof, unless otherwise herein agreed and an additional compensation paid therefor. All of the stipulations and conditions in this receipt shall extend to and inure to the benefit of each and every person or company to whom this company may entrust or deliver the above described property for transportation, storage or delivery.

The party accepting this receipt thereby agrees to its conditions.

Date, 190-.	Articles.	Value.	Address.	Destination	Received.
Aug. 28–07–C. 21,227.	One Pkg.	C.	Neiman-Marcus Co.	Dallas, Texas.	J. Manning, 1.

Testimony of E. L. Riley.

E. J. Riley, witness for defendant, upon direct examination, testified as follows: My name is E. J. Riley. I live in Dallas, Texas, and am agent for Wells-Fargo & Company here at Dallas. I have been such agent for eleven years past and have been engaged in the express business for twenty three years. I am familiar with the rules and regulations governing the express business and the method and manner of handling packages by the Wells-Fargo & Company's Express. On August 31, 1907, a number of packages arrived over our line, addressed to Neiman-Marcus Company here at Dallas, and upon checking up these various packages, we found that there was one package missing. The package which was missing was shown by the way bill to be a 7 pound package which had been shipped from New York. A few days after this, on or about the 2nd of September, 1907, a number of other packages arrived over our line, addressed to

Neiman-Marcus Company, at Dallas, and upon checking up these packages we found an extra package, that is, there was an over package, one more than was called for by the bill. This package came in on what is called an over way bill, which is made out by the messenger en route. This extra package weighed 16 pounds. We
20 assumed that this extra package was the one that had been
missing in the previous shipment and took it for granted that it was the same package for which we had received the way bill showing the shipment of a 7 pound package. We, therefore, changed the weights on this way bill from 7 pounds to 16 pounds and added an additional 65 cents charge for the excessive weight over and above the 7 pounds, and this last package was delivered to Neiman-Marcus Company and they paid us the charges upon the 16 pound package. The 7 pound package never did arrive and was never delivered to Neiman-Marcus Company, but we thought the 16 pound package was the same package and considered the matter closed until later on Mr. Neiman notified us that he was still short a package of furs which had been shipped to him from New York and claimed that the same had never been delivered to him. Witness is here handed what purported to be original way bill for said 7 pound package and then testified as follows: This paper that is handed me is the original way bill made up in New York City and shows on its face that on August 28, 1907, there was billed from New York City a package addressed to Neiman-Marcus Co., at Dallas, Texas; said package weighing 7 pounds. The express charges for transportation of same are fixed in way bill at $1.00, said charges to be collected at destination. I know this to be the original way bill from my course of dealing with the company's business in the past and because the same was sent to me direct from the New York office and was intended to accompany the package en route from New York to Dallas. I am familiar with the rules of the Company in handling of packages intrusted to them for carriage and am familiar with the rates and charges made by the Company for packages for various weights and values. We have two kinds of way bills under which packages are shipped. When a package is valued at $50.00 or less than $50.00 it is shipped out under what is known as a regular freight way bill and when
21 the valuation is declared to be more than $50.00 it is shipped
out under what is known as a money way bill. It is a rule and custom of the company, where no valuation at all is declared upon a package handed to the company, for the company to ship the same out as of the estimated value of $50.00 or less. That is, it is shipped out under an ordinary freight way bill and under these conditions a rate is charged based upon a package of the value of $50.00. It is a rule and custom of the company, where the value of the package to be shipped is declared to be more than $50.00, to charge an additional amount as a rate of shipment for such excess value over and above the $50.00. This excess rate on valuation is fixed by tariffs. Neiman-Marcus Company had never paid the express charges for the 7 pound package, but the charges collected were for the 16 pound package, which was afterwards delivered to them on an overway bill. In handling express matter, all packages of the value

of $50.00 or less are billed out under an ordinary freight way bill and are handled as ordinary freight matter in our car. That is, they are piled up indiscriminately in the car and are transferred from one train to another on ordinary trucks and are seldom ever checked over by the messengers and agents handling them. The volume of this character of express matter is so great that it is usually impossible for the messengers to check these packages with the way bills en route and this is seldom done. These packages are handled in depots and transfer stations on ordinary trucks and the company does not require each messenger handling these packages to secure a receipt from the messenger to whom he delivers them. Where the value of a package is declared to be more than $50.00 it is billed out under what is known as a money way bill and receives a different service and handling from ordinary express matter of the value of $50.00 or less. It is classed as a valuable shipment. All valuable shipments are at all times required to be under the personal observation of the messenger or party to whom they are intrusted,
22 and while en route upon the trains, if the package is small
enough, it is placed in the iron safe and locked up. If the package is too large to be placed in the safe, it is segragated and separated from the ordinary express matter and put in some particular place in the car where it can be at all times under the personal observation and care of the messenger in charge of the same. The company also requires that each of its messengers and representatives, into whose charge a valuable package passes, must give a receipt to the messenger or representative from whom he receives the same, and must also secure a receipt from the messenger or representative to whom he delivers it. Valuable packages at depots and transfer stations, are not placed upon the ordinary trucks with ordinary express matter of the value of $50.00 or less, but are taken charge of at these points by the money clerk and are taken by him into the depots or transfer stations and placed behind the iron cage where they will be protected and at destination a money clerk takes charge of the valuable packages and sees to it that they are safely carried into the distributing office. In the handling of ordinary express matter of the value of $50.00 or less the company does not require one messenger to receipt another for these packages as he receives them or to secure receipts when he delivers them to the next succeeding messenger. In case of the loss of a package of $50.00 or less it is a difficult matter to trace and find just where the same was lost or in whose hands it was at the time it was lost and such package can seldom be successfully traced when lost. In case of a shipment of valuable package or a package valued at more than $50.00, the company can always trace the same and find out which of its messengers is responsible for the loss of the package and can hold the messenger losing the package responsible for its loss, because the preceding messenger who delivered the package to him always has his re-
23 ceipt for it and for this reason valuable packages are seldom
ever lost. These messengers are all under bond.

On Cross Examination Witness Riley Testified As Follows: Where a package is shipped out under an ordinary freight way bill, that is,

a package of the value of $50.00 or less, the express messengers do sometimes check these packages with the way bills. They are expected to do this if they can find the time, but the volume of that character of business is so great that it is seldom ever done and is not compulsory. This way bill for the shipment of the 7 pound package was handled by a number of messengers en route between New York and Dallas. I cannot tell from this way bill whether or not any of these messengers ever checked this package en route with the way bill to see whether or not the same was on hand. The stamp marks on the back of the way bill, which shows the names of the different messengers handling this package, their train number and the divisions over which they worked, do not indicate that the messenger checked up his run and found the package called for by this way bill. These stamp marks are placed on each way bill by every messenger through whose hands the way bill passes so that if any question should come up about the package the Company will have a record on the way bill, showing the different messengers who handled the package. The stamps of these different messengers are placed on these way bills whether they check the package or not. I see the notation made on the way bill "Short from Paris." This may or may not indicate that the package was carried by the Company to Paris, Texas, and lost between Paris and Dallas. The package might have been lost at some other point en route between New York and Paris and not have been discovered by the messenger until he reached Paris, Texas, at which time he would make a notation on the way bill at or after leaving Paris, Texas the package was missed for the first time. Paris, Texas, is a transfer station and all
24 express matter and way bills destined to Dallas are transfered at that point. The package might have been lost between St. Louis and Paris and it would not have been discovered until the messenger arrived at Paris, which is a transfer point. We have two kinds of way bills, one an ordinary freight way bill and the other a money way bill. These are the only character of way bills that the company uses. All express matter valued at $50.00 or less is shipped out under the ordinary freight way bill and all express matter where the value is declared to be more than $50.00 is shipped out as a valuable package under a money way bill. This bill which I have examined here is an ordinary freight way bill.

Defendant offered in evidence the Freight Way Bill testified to by witness E. J. Riley, which is as follows:

Freight Way Bill Wells Fargo & Co. Express via Frisco 13.

Freight Way-Bill.

Clerk — Train No. — W. B. No. 206 Aug. 28, 1907.
Caller — No. — from New York Depot to Dallas, Texas.
Article. Value. From whom received. Address. Destination.
Neiman-Marcus Co.

Weight.	Expense.	Our charges.	Collect.	Prepaid.	Add for undercharges.
16 (7)		$1.00	$1.00		65
		Short from Paris.			Remarks.
					Transferred at Paris, Texas.

All messengers must register in rotation on Back of this Way-bill, beginning at left hand.

Agents at Transfer Points must stamp the names of their offices on face of this Way-Bill.

Agents at Destination must verify Tariff and make Total Footings on this Way-Bill.

Endorsements on back of Way-Bill are as follows: B. C. Munday, Santa Fe Route. Tr. 68 Sep. 1st, 1907.

H. F. Feadle Aug. 30, 1907, Erie—C. & E. I. Rte. Rochester, Ind. & St. Louis, Mo.

J. C. Brownell, Tr. 13, Aug. 30, 1907. Salamanco Route Erie R. R. Sealed Car or trunk.

25 Guy R. Radft, St. L. & S. F. Tr. 1, Aug. 31, 1907, St. Louis & Paris.

Defendant offered in evidence an agreement between plaintiff and defendant, which is as follows:

Agreement Between Plaintiff and Defendant.

In the County Court at Law in and for Dallas County, Texas.

No. 14918.

NEIMAN-MARCUS COMPANY
vs.
WELLS FARGO & COMPANY.

It is agreed by and between the plaintiff and the defendant that tariff I. C. C.—1, No. 17, revised to November 15th, 1906, showing classification and tables of graduated charges over the lines of the Wells Fargo & Company Express, has been duly promulgated, published, posted and filed with the Interstate Commerce Commission as is required by law. It is further agreed that said tariff or classification and table of graduated charges was in full force and effect on August 28th, 1907.

And it is further agreed that a copy of the same may be introduced in evidence upon the trial of the above entitled and numbered cause without making proof of such publishing, posting and filing as is required by law.

It is further agreed that common point tariff, "I. C. C. Joint Rates No. 1," showing merchandise rates from the City of New York in the State of New York, to the City of Dallas, State of Texas, has been duly promulgated, published, posted and filed with the Interstate Commerce Commission as is required by law, and that the same were in full force and effect on August 28th, 1907.

It is further agreed that a copy of said common point tariff may be introduced in evidence without proof being made of such publishing, posting and filing as is required by law.

RHODES S. BAKER,
Attorney for Plaintiff.
ALEXANDER & HOGSETT,
Attorneys for Defendant.

26 *Common Point Tariff I. C. C., Joint Rates* #1.

Defendant offered in evidence Common Point Tariff I. C. C. Joint Rates #1, showing merchandise Rates from the City of New York and State of New York to the City of Dallas, State of Texas, Via Wells Fargo Co.'s Express.

Said tariff shows on page 23 thereof that the merchandise rate from New York City to Dallas is $6.00 per hundred pounds.

Tariff I. C. C. #17, *Revised to November* 15, 1906.

Defendant offered in evidence "Tariff I. C. C.—1, #17, revised to November 15th, 1906, showing classification and tables of Graduated Charges over the lines of Wells Fargo & Company Express; The portions of said tariff applicable to this case are as follows:

Graduated Charges for Packages Weighing Less than 100 *Lbs.*

1. The graduated charge for packages weighing less than 100 pounds, where the merchandise rate is $6.00 per 100 pounds, would be as follows:

When the rate between any two points is not given below, use the next higher rate for making price.

See Rule 6.

When rate is					$6.00
Packages not over				1 lb	.30
Over 1 lb.	"	"		2 lb	.35
"	2 "	"	"	3 "	.45
"	3 "	"	"	4 "	.60
"	4 "	"	"	5 "	.80
"	5 "	"	"	7 "	1.00
"	7 "	"	"	10 "	1.15
"	10 "	"	"	15 "	1.35
"	15 "	"	"	20 "	1.65
"	20 "	"	"	25 "	1.85
"	25 "	"	"	30 "	2.10
"	30 "	"	"	35 "	2.50
"	35 "	"	"	40 "	2.75
"	40 "	"	"	45 "	3.00
"	45 "	"	"	50 "	3.00

27 Paid tariff further provides:

10. Valuation Charges of Merchandise:

(*a*) When the value of any merchandise shipment (C. O. D.) or otherwise exceeds $50.00, the following additional charge must be made on the declared value:

"Charge for value whether insured or not.

(*b*) When merchandise rate is $1.00 or less per 100 lbs., 5 cents for each $100 value, or fraction thereof, minimum 10 cents.

(*c*) When merchandise rate exceeds $1.00 and not more than $3.00 per 100 lbs., 10 cents for each $100 value or fraction thereof.

(*d*) When merchandise rate exceeds $3.00 and not more than $8.00 per 100 lbs., 15 cents for each $100 value, or fraction thereof.

(*e*) When merchandise rate exceeds $8.00 per 100 lbs., 20 cents for each $100 value or fraction thereof.

(*f*) "The charges for value, as shown above, must in all cases be based on the regular merchandise rates and not on the special rates which may have been authorized for particular shipments." Said Original Tariffs are here referred to and made part hereof and by order of trial court are being sent up as part of this record.

Plaintiff offered in evidence a portion of said tariff under the head of rules as follows:

1. (*a*) Give a receipt of the prescribed form for all matter received. Always ask shippers to declare the value and when given insert it in the receipt, mark it on the package and enter the amount on the waybill. If shippers refuse to state value, write or stamp on the receipt "Value asked and not given."

Plaintiff closes.
Defendant closes.

We hereby agree that the above and foregoing is a true and correct statement of the evidence introduced upon the trial of the above entitled and numbered cause, which formed the basis for the judgment of the Court.

28 RHODES S. BAKER,
Attorney for Plaintiff.
ALEXANDER & HOGSETT,
Attorneys for Defendant.

Examined and approved, this Mch. 15, 1909. W. M. Holland, Judge Co. Ct. of Dallas Co. at Law, Dallas Co., Tex.

Filed Mar. 15, 1909, Jack M. Gaston, Clerk County Court at Law, By B. F. Cullom, Deputy.

Plaintiff's Bill of Exception No. 1.

Filed Mar. 15, 1909.

In the County Court of Dallas County, at Law.

No. 14918.

NEIMAN-MARCUS COMPANY
vs.
WELLS FARGO EXPRESS CO.

Be it remembered that on the trial of the above numbered and entitled cause the defendant propounded interrogatories to its witness, E. J. Riley, to elicit testimony from said witness as to the rules of the

company handling packages and customary classifications and charges therefor, all of which testimony was objected to by the plaintiff when offered, upon the ground that no proof of rules, usages and customs and classifications were admissible against plaintiff unless shown in tariffs regularly promulgated and filed, pursuant to law, and upon the further ground that the evidence offered as to the terms and effect of said rules, usages and customs and classifications were not the best evidence, and embodied but the conclusion and opinion of the witness, all of which objections were over-ruled, and the witness answered as follows: "We have t-o kinds of way bills under which packages are shipped. When a package is valued at $50.00, or less than $50.00, it is shipped out under what is known as regular freight way bill, and when the valuation is declared to be more than $50.00, it is shipped out under what is known as a money way-bill.

It is a rule and custom of the Company where no valuation at
29 all is declared upon a package handed to the company for
the company to ship the same out as of the estimated value of $50.00, or less. That is, it is shipped out under an ordinary freight way bill, and under these conditions a rate is charged based upon a package of the value of $50.00. It is a rule and custom of the Company where the value of the package to be shipped is declared to be more than $50.00 to charge an additional amount for excess value over and above the $50.00. This excess rate on valuation is fixed by tariffs in handling express matter. All packages of the value of $50.00, or less, are billed out under an ordinary freight way bill, and are handled as ordinary freight matter in our car. They are transferred from one train to another on ordinary trucks, and are seldom ever checked over by the messengers and agents handling them. These packages are handled in the depots and transfer stations on ordinary trucks, and the company does not require each messenger handling these packages to secure a receipt from the messenger to whom he delivered them. Where the value of the package is taken to be more than $50.00, it is billed out under what is known as a money way bill, and receives a different service in handling to the ordinary express package of $50.00 or less. It is classed as a valuable shipment. All valuable shipments are at all times required to be under the personal observation of the messenger, or party to whom they are entrusted, and while enroute upon the trains, if the shipment is small enough, it is placed in the iron safe and locked up; if the package is too large to be placed in the safe it is segregated from the ordinary express matter and put in some particular place in the car where it can be, at all time, under the personal observation and care of the messenger in charge of the same. The Company also requires
that each of its messengers and representatives having in his
30 charge a valuable package, must give a receipt to the messen-
ger or representative from whom he received the same, and must also receive a receipt from the messenger or representative to whom he delivers it. Valuable packages at depots and transfer stations are not placed upon ordinary trucks with ordinary express matter of the value of $50.00, or less, but are taken charge of at these points by the money clerk, and are taken by him into

the depot or transfer station and placed in the iron cage where they will be protected and at the destination the money clerk takes charge of the valuable packages and sees to it that they are safely carried to the distributing office. In the handling of ordinary express matter of the value of $50.00 or less, the Company does not require one messenger to receipt another for these packages as he receives it, or to secure receipts when he delivers them to the next succeeding messenger.

To each of which several statements of the witness as and when given the plaintiff excepted, and now here excepts to said several statements separately and presents this, its Bill of Exception No. 1, which is allowed.

O. K.
BAKER.

O. K.
S. J. HOGSETT.

Examined and approved this March 15, 1909. W. M. Holland, Judge Co. Ct. of Dallas Co. at Law, Dallas Co., Tex. Filed Mar. 15, 1909. Jack M. Gaston, Clerk County Court at Law, by B. F. Cullom, Deputy.

14918.

NEIMAN-MARCUS CO.
vs.
WELLS, FARGO & CO. EXPRESS.

Judgment.

SATURDAY, *Jan.* 23, 1909.

Entered as of Jan. 7, 1909.

On this day coming on to be heard the above numbered and entitled cause and both parties having appeared by their at-
31 torneys and announced ready for trial, a Jury being waived and the Court having considered the evidence introduced by both sides and to the arguments of Counsel, and it appearing to the Court that the law and the facts are with the plaintiff: It is hereby ordered, adjudged and decreed by the Court that plaintiff Neiman-Marcus Company, a corporation, do have judgment against defendant, Wells Fargo & Company Express, in the sum of Four Hundred ($400.00) Dollars, together with interest thereon at the rate of six per cent per annum from September 1st, 1907, and all costs of this suit, for all of which let execution issue. To which action of the Court the defendant in open Court excepted and gave notice of appeal to the Court of Civil Appeals for the 5th Supreme Judicial District of Texas, and is given and granted twenty (20) days from and after the adjournment of this Court for this term in which to prepare and file a Statement of Facts and Bills of Exception.

Appeal Bond.

Filed Jan. 25, 1909.

In the County Court at Law, Dallas County, Texas.

No. 14918.

NEIMAN-MARCUS COMPANY
vs.
WELLS, FARGO & COMPANY.

Whereas, in the above entitled and numbered cause pending in the County Court at Law of Dallas County, Texas, at a regular term of said Court, to-wit: On the 7th day of January, A. D. 1909, the said Neiman-Marcus Company, a corporation, recovered judgment against the said Wells Fargo & Company, a corporation, for the sum of Four Hundred Dollars ($400.00), together with interest thereon from the 1st day of September, A. D. 1907, at 6% per annum, and for all costs of suit, to which judgment of the Court the defendant, Wells Fargo & Company in open Court excepted and gave notice of appeal to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, and from which judgment the said
Wells Fargo & Company has taken an appeal to said Court
32 of Civil Appeals for the Fifth Supreme Judicial District of
Texas, at Dallas, in the County of Dallas.

Now, therefore, we Wells Fargo & Co., as principal, and G. H. Pittman and E. J. Riley, as sureties, acknowledge ourselves bound to pay said Neiman-Marcus Company the sum of Twelve Hundred Dollars ($1200.00) conditioned that the said Wells-Fargo & Company, appellant shall prosecute its appeal with effect, and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against it, it shall perform its judgment, sentence or decree and pay all such damages as said Court may award against it.

Witness our hands this the 25th day of Jan'y, A. D. 1909.

WELLS-FARGO & CO., *Principal,*
By ALEXANDER & HOGSETT, *Att'ys.*
G. H. PITTMAN, *Surety.*
E. J. RILEY, *Surety.*

I have fixed the probable amount of the costs of this suit in the Court of Civil Appeals, the Supreme Court and the Court below at One Hundred Dollars ($100) and approved the foregoing bond.

This the 25 day of January, A. D. 1909.

JACK M. GASTON,
Clerk of the County Court at Law,
Dallas County, Texas.
By FRED PATRICK, *Dpty.*

Filed Jan. 25, 1909. Jack M. Gaston, Clerk County Court at Law, by Fred Patrick, Deputy.

Defendant's Assignments of Error.

Filed Mar. 23, 1909.

In the County Court at Law in and for Dallas County, Tex.

No. 14918.

NEIMAN-MARCUS COMPANY
vs.
WELLS-FARGO COMPANY.

Now comes the defendant in the above entitled and numbered cause, and represents to the Court that the following errors
33 were committed upon the trial of the above cause to the material prejudice of the defendant, upon which the defendant will rely for a reversal of the judgment.

First.

The Court should have rendered judgment in favor of the defendant and erred in not so doing because the uncontradicted evidence in the case shows that the shippers, A. Jacobson & Bro., who delivered the property for transportation to the defendant company, did knowingly and wilfully, by false billing, false classification, false representation as to the contents of the package, or by other device or means, obtain transportation for such property at less than the legal rates then established and in force on the lines of transportation of this defendant between New York City and Dallas, Texas.

Second.

The Court should have rendered judgment for the defendant, and erred in not doing so, because under the uncontradicted evidence, the payment by defendant to plaintiff of a sum of money greater than the value of the package, which formed the basis for the rate charged by defendant for transporting said package from the City of New York to Dallas, Texas, would result in the defendant directly or indirectly, by a special rate, rebate, drawback or other device, charging, collecting and receiving from the plaintiff herein a less compensation for the services rendered in transporting said package than defendant charges, demands, collects and receives from other person or persons for doing them a like and contemporaneous service in the transportation of merchandise of like kind and value of the package claimed to have been lost by plaintiff and would result in defendant giving to plaintiff an undue and unreasonable preference and advantage over other persons or corporations shipping merchandise over the lines of defendant.

34 **Third.**

The Court should have rendered judgment in favor of the defendant and erred in not so doing because under the uncontradicted evidence, a payment by the defendant to plaintiff of a greater sum than the value of the package which formed the basis for the rate of transportation from New York City to Dallas, would result in the defendant charging, demanding, collecting and receiving a less or different compensation for such transportation of said property between said points than the rates, fares and charges which are specified in tariffs duly published posted and filed with the Interstate Commerce Commission, as required by law, and in full force and effect at the time it accepted said package for shipment, and would result in defendant refunding and remitting to the plaintiff a portion of the rates, fares and charges and extending to plaintiff privileges contrary to the provisions and stipulations in said tariffs contained.

Fourth.

The Court should have rendered judgment in favor of the defendant and erred in not so doing, because under the uncontradicted evidence, if the defendant should pay to plaintiff a sum of money greater than the value of the goods, which formed the basis for the rate of transportation, said act would be an offense against the Criminal Laws of the United States, if performed voluntarily by defendant, and if performed under the judgment of the Court, would in effect result in the Court requiring the defendant to do an act which, if committed voluntarily, would be an offense against the Criminal Laws of the United States.

Fifth.

The Court should have rendered a judgment for the defendant, and erred in not so doing, because under the uncontradicted evidence, if the plaintiff should accept or receive a greater sum
35 of money than the value of the goods, which formed a basis for the rate of transportation, that said act, if committed voluntarily by the plaintiff, would be an offense against the Criminal Laws of the United States, and if accepted under a judgment of this Honorable Court, would in effect result in the Court aiding and enforcing in plaintiff's favor the payment of money to plaintiff in violation of the Criminal Laws of the United States.

Sixth.

The Court should have rendered judgment in favor of the defendant and erred in not so doing, because under the uncontradicted evidence, for plaintiff to accept and receive, and for defendant to pay a greater sum of money than the value of the package, which formed the basis for the rate of transportation, would be a rebate, concession and discrimination in respect to said shipment in that said shipment would be carried at a less rate than that named in the

inter-state tariffs, duly published, posted and filed as required by law, and in force at the time said shipment was received, and plaintiff would thereby receive an advantage over other persons or shippers making a shipment of like kind and character.

Seventh.

The Court should have rendered judgment in favor of the defendant, and erred in not so doing, because the uncontradicted evidence shows that the shippers, A. Jacobson & Bro., did knowingly and wilfully, falsely bill and falsely classify said shipment and did misrepresent and conceal from the defendant the true value of said package, and thereby obtained a less rate of transportation than that provided by the Interstate Tariffs, duly published, posted and filed, thus perpetrating a fraud upon defendant, whereby said plaintiff should have been estopped from claiming that said package was of a greater value than $50.00, which amount formed the basis of the rate of transportation.

36

Eighth.

The Court erred in not holding that plaintiffs were estopped from claiming more than the $50.00, the value of the package which formed the basis for the rate, because the uncontradicted evidence shows that the shippers, A. Jacobson & Bro., by their acts and omissions, knowingly deceived and mislead the defendant as to the value of said package, and had the true value of said package been disclosed to the defendant, defendant would have charged a greater rate for transportation and the same would have been handled by the defendant in such a manner that defendant would not have suffered loss.

Ninth.

The Court should have rendered judgment in favor of the defendant, and erred in not so doing, because under the uncontradicted evidence the shippers, A. Jacobson & Bro., are shown to have misrepresented or concealed the value of the package delivered to defendant for transportation, and thereby to have secured a less rate for the transportation or carriage of the same from New York City to Dallas, than the rate provided by the law, and to have misled and deceived the defendant as to the value of said package, thereby causing the defendant to believe the said package to be of small value and to relax its vigilance in caring for and protecting the same that it would otherwise have exercised had the true value of the package been disclosed which said acts constitute a fraud upon the rights of the defendant and plaintiffs should have been estopped from claiming that said package was of a greater value than the sum of $50.00, which formed the basis for the rate of transportation.

ALEXANDER & HOGSETT,
Attorneys for Defendant.

Filed Mar. 23, 1909. Jack M. Gaston, Clerk County Court at Law, By B. F. Cullom, Deputy.

37 *Defendant's Motion to Send Up Original Tariffs with Transcript of the Record.*

Filed Mar. 23, 1909.

In the County Court, at Law, in and for Dallas County, Texas.

No. 14918.

NEIMAN-MARCUS COMPANY
vs.
WELLS-FARGO COMPANY.

Now comes the defendant in above entitled and numbered cause, and moves the Court to enter an order directing the Clerk to send up with the transcript of the record original Tariffs I. C. C. 1, #17, revised to November 15, 1906, and Common Point Tariffs, I. C. C. Joint Rates #1, showing merchandise rates from the City of New York, State of New York, to City of Dallas, State of Texas, which said records were introduced in evidence and are too voluminous to be copied in the transcript and it being necessary that the Upper Court should have a full and complete understanding of the contents in order to intelligently pass upon the merits of the case.

ALEXANDER & HOGSETT,
Attorneys for Defendant.

Filed Mar. 23, 1909. Jack M. Gaston, Clerk County Court at Law, By B. F. Cullom, Deputy.

Order of Court Ordering Original Tariffs Sent Up with the Transcript for *Record.*

No. 14918.

NEIMAN-MARCUS COMPANY
vs.
WELLS-FARGO COMPANY.

On this the 23rd day of March, A. D. 1909, came on to be heard defendant's motion to have the Clerk send up with the transcript the original Tariffs I. C. C. 1 #17 revised to November 15, 1906, and Common Point Tariff I. C. C. Joint Rates #1, and the same having been heard and considered by the Court, it is in all things approved and allowed, and it is therefore ordered, adjudged and decreed that said original tariffs be attached by the Clerk of this Court to the transcript of the record in this case and be made a part thereof.

38 No. 14918.

NEIMAN-MARCUS CO.
vs.
WELLS-FARGO & CO.

Plaintiff's Attorney, Rhodes S. Baker.
Defendant's Attorney, —— ——.

Cost Bill.

Judgment rendered, Jan. 7, 1909, against Def't for $400.00.
Rate of Interest 6 per cent.
Judgment entered Minute Book 3, page 557.
Suit filed Dec. 19, 1907.

Clerk's Fees.

1907.		
Dec. 19.	Filing & Docketing	$ .15
" 19.	Issuing Citation	.50
1908.		
Feb. 8.	Filing Answer	.05
July 20.	Filing Deposition	.05
1909.		
Jan. 6.	Filing Amended Answer	.05
Jan. 23.	Entering Judgment	.50
" 23.	Filing & Approving Appeal Bond	1.05
M'ch 15.	Filing Statement of Facts	.05
" 15.	Filing Bill of Exceptions	.05
" 26.	Making Transcript	10.80
" 26.	Clerk's Certificate	.50

Sheriff's Fees.

1907.		
Dec. 21.	Serving Citation	.95
	Notary Fees, I. A. Levy	10.00
	Total	$24.70

Clerk's Certificate.

THE STATE OF TEXAS,
County of Dallas:

I, Jack M. Gaston, Clerk of the County Court of Dallas County at Law, within and for the County of Dallas and State of Texas, do hereby certify that the above and foregoing 38 pages contains a true and correct copy of all the proceedings had in the above cause No. 14918, Entitled, Neiman-Marcus Company vs. Wells Fargo & Company, as the same appears of record and on file in my Office.

Witness my hand and Official Seal of Office, this the 26th day of March, A. D. 1909.

39 JACK M. GASTON,
Clerk County Court of Dallas County, at Law,
[SEAL.] By FRED PATRICK, *Deputy.*

40 *Opinion of the Court of Civil Appeals.*

No. 5997.

WELLS, FARGO & COMPANY, Appellant,
VS.
NEIMAN-MARCUS COMPANY, Appellee.

Appeal from Dallas County.

This is a suit to recover the value of one set of furs brought by appellees against appellant, the allegation being, in effect, that said furs were received by appellant in New York to be transported and delivered to appellees in Dallas, Texas, and that the appellant has failed to deliver same, which were of the value of $500.00.

The appellant defended on the ground that no value was placed on the furs at the time it received them and its receipt contained a stipulation, "that in no event shall the Express Company be held liable beyond the sum of fifty dollars, at which sum the property is hereby valued, unless a different value is hereinabove stated." That said package was received in good faith, appellant believing same was not of value exceeding $50.00 and that a charge for transportation was pased upon such value. That it received the package from A. Jacobson & Bro., who are merchants and kept one of the express company's receipt books, and whenever they wished to express a package they would fill out a receipt therefor and deliver the package, the express company signing said receipt, which course was followed in this instance. That said Jacobson & Bro. knew that the express company made a greater charge for packages of value in excess of $50.00 and that where no value is specified a charge is made at the rate for packages of the value of $50.00 or less. That by the failure of the shipper to place the value of said furs on the receipt, the express company was misled to believe that said package was of the value of $50.00, which prevented the express company from making a greater charge for the transportation of said package.

That said shippers knowingly and wilfully falsely billed and
41 classified said package, etc. That to recognize appellees' claim
the appellant would be guilty of charging, demanding, collecting and receiving a less or different compensation for such transportation than the tariffs duly established, as required by law, and thereby subject itself to prosecution.

A trial resulted in a judgment in favor of appellees for $400.00.

This cause was tried by the court without a jury. There is practically no conflict in the evidence so there is no question arising

except whether or not the judgment rendered by the court is supported by the evidence.

The appellant insists that the shippers of the furs, A. Jacobson & Bro., by failing to state in the blank form of the receipt which they presented to the express company for signing the true value of the package, or telling the company's agent the value, were guilty of a fraud, wilfully and knowingly, with the intention of getting the package transported at a less rate than the value warranted.

The shippers had a book of blank receipts of the appellant, and knew the custom that in the absence of a valuation, packages would be carried at a rate as of the value of $50.00, and if the value was greater than $50.00 the rate would be increased accordingly. But is the evidence such that it shows such a wilful concealment as to make the act a fraud per se? The package was delivered to the express company by the shipping clerk of Jacobson & Bro. for transportation, and there is no evidence to show that Jacobson & Bro. personally knew how the receipt was filled out or to what company the package was delivered.

The rules of the company require their agents to "give a receipt of the prescribed form for all matter received. Always ask shippers to declare the value, and when given insert it in the
42 receipt, mark it on the package and enter amount on the waybill. If shippers refuse to state value, write or stamp on the receipt, 'value asked and not given.'" On this occasion the shipper was not asked to declare the value of the package, nor was the value mentioned by either party, and no entry of the value entered in the receipt or way-bill.

The testimony raised the issue of fraud on the shippers' part, but the law never presumes fraud and under the evidence it is just as fair to presume that value was never thought of at the time, and that the shipper never intended to conceal value from the express company. The express company's agent failed to perform a plain duty, that is, he failed to have the shipper declare the value, and failing in this duty we are of the opinion that the company is in no attitude to complain that the shipper did not state the value. In any event, it was a question for determination, and the trial court was justified under the evidence in finding against the express company. It cannot require of a shipper the performance of a duty which was, at least, its plain duty to perform and which it failed to perform.

In failing to deliver the package which it agreed to transport and deliver, it breached its contract and thereby became liable for the full value of the articles it failed to deliver.

The stipulation in the receipt attempting to restrict or limit its liability in the respect stated was contrary to law and is void.

We think there is no merit in the defense that by the payment of the value of the furs the express company would be liable to prosecution for violation of the law.

The judgment is affirmed.

RAINEY,
Chief Justice.

Delivered February 5th, 1910.

43 Filed in Court of Civil Appeals Feb. 5th, 1910, Geo. W. Blair, Clerk 5th District.

Judgment of Court of Civil Appeals.

5997.

WELLS, FARGO & CO.
vs.
NEIMAN-MARCUS CO.

From County Court, Dallas Co.

SATURDAY, *February 5th,* 1910.

Opinion of the Court delivered by Mr. Rainey, Chief Justice:

This cause came on to be heard on the transcript of the record and the same being inspected, because it is in the opinion of this Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellee, Neiman-Marcus Company, do have and recover of appellant, Wells-Fargo & Company, and G. H. Pittman and E. J. Riley, its sureties upon appeal bond the amount adjudged below and all costs in this behalf expended and this decision be certified below for observance.

Appellant's Motion for Re-*Rehearing.*

In the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas.

#5997.

WELLS, FARGO & COMPANY, Appellant,
vs.
NEIMAN-MARCUS COMPANY, Appellee.

Now comes the appellant, Wells, Fargo & Company, and moves the Court to set aside the opinion and judgment of the Court, rendered hereon, on, to-wit, the 5th day of February, 1910, and to grant to appellant a rehearing herein, and as a grounds therefor appellant represents to the Court that the Court, in its opinion rendered, committed the following errors:

44 1. The Court erred in affirming the judgment of the lower Court and in refusing to sustain appellant's first assignment of error, which is as follows:

"The Court should have rendered judgment in favor of the defendant and erred in not so doing, because the uncontradicted evidence in the case shows that the shippers, A. Jacobson & Bro., who delivered the property for transportation to the defendant Company,

did knowingly and wilfully, by false billing, false classification, false representation as to the contents of the package, or by other device or means, obtain transportation for such property at less than the legal rates then established and in force on the lines of transportation of this defendant between New York City and Dallas, Texas."

2. The Court erred in affirming the judgment of the lower court and in refusing to sustain appellant's second assignment of error, which is as follows:

"The court should have rendered judgment for the defendant, and erred in not doing so, because under the uncontradicted evidence the payment by defendant to plaintiff of a sum of money greater than the value of the package, which formed the basis for the rate charged by the defendant for transporting said package from the City of New York to Dallas, Texas, would result in the defendant directly or indirectly, by a special rate, rebate, drawback or other device, charging, collecting and receiving from the plaintiff herein a less compensation for the services rendered in transporting said packages than defendant charges, demands, collects and receives from other person or persons for doing for them a like and contemporaneous service in the transportation of merchandise of like kind and value of the package claimed to have been
45 lost by plaintiff and would result in defendant giving to plaintiff an undue and unreasonable preference and advantage over other persons or corporations shipping merchandise over the lines of defendant."

3. The court erred in affirming the judgment of the lower court and in refusing to sustain appellant's third assignment of error, which is as follows:

"The Court should have rendered judgment in favor of the defendant and erred in not so doing, because under the uncontradicted evidence a payment by the defendant to plaintiff of a greater sum than the value of the package, which formed the basis for the rate of transportation from New York City to Dallas, would result in the defendant charging, demanding, collecting and receiving a less or different compensation for such transportation of said property between said points than the rates, fares and charges which are specified in tariffs duly published, posted and filed with the Interstate Commerce Commission, as required by law, and in full force and effect at the time it accepted said package for shipment, and would result in defendant refunding and remitting to the plaintiff a portion of the rates, fares and charges and extending to plaintiff privileges contrary to the provisions and stipulations in said tariffs contained."

4. The Court erred in affirming the judgment of the lower court and in refusing to sustain appellant's fourth and fifth assignments of error, which are as follows:

(Fourth.) "The court should have rendered judgment in favor of the defendant and erred in not so doing, because under the uncontradicted evidence, if the defendant should pay to plaintiff a sum of money greater than the value of the goods, which formed the

basis for the rate of transportation, said act would be an offense against the criminal laws of the United States, if performed
46 voluntarily by defendant, and if performed under the judgment of the court, would in effect result in the court requiring the defendant to do an act which, if committed voluntarily, would be an offense against the criminal laws of the United States."

(Fifth.) "The court should have rendered a judgment for the defendant, and erred in not so doing, because under the uncontradicted evidence, if the plaintiff should accept or receive a greater sum of money than the value of the goods, which formed a basis for the rate of transportation, that said act, if committed voluntarily by the plaintiff, would be an offense against the criminal laws of the United States, and if accepted under a judgment of this Honorable Court, would in effect result in the court aiding and enforcing in plaintiff's favor the payment of money to plaintiff in violation of the criminal laws of the United States."

5. The Court erred in affirming the judgment of the lower court and in refusing to sustain appellant's sixth assignment of error, which is as follows:

"The court should have rendered judgment in favor of the defendant and erred in not so doing, because under the uncontradicted evidence, for plaintiff to accept and receive, and for defendant to pay a greater sum of money than the value of the package, which formed the basis for the rate of transportation, would be a rebate, concession and discrimination in respect to said shipment in that said shipment would be carried at a less rate than that named in the Interstate Tariffs, duly published, posted and filed as required by law, and in force at the time said shipment was received, and plaintiff would thereby receive an advantage over other persons or shippers making a shipment of like kind and character."

47 6. The Court erred in affirming the judgment of the lower court and in refusing to sustain appellant's seventh and eighth assignments of error, which are as follows:

(Seventh.) "This court should have rendered judgment in favor of the defendant, and erred in not so doing, because the uncontradicted evidence shows that the shippers, A. Jacobson & Bro., did knowingly and wilfully falsely bill and falsely classify said shipment and did misrepresent and conceal from the defendant the true value of said package, and thereby obtained a less rate of transportation than that provided by the Interstate Tariffs, duly published, posted and filed, thus perpetrating a fraud upon defendant, whereby said plaintiff should have been estopped from claiming the said package was of a greater value than $50.00, which amount formed the basis of the rate of transportation."

(Eighth.) "The Court erred in not holding that plaintiffs were estopped from claiming more than $50.00, the value of the package which formed the basis for the rate, because the uncontradicted evidence shows that the shippers, A. Jacobson & Bro., by their acts and omissions, knowingly deceived and mislead the defendant as to the value of said package, and had the true value of said package been disclosed to the defendant, defendant would have charged a greater

rate for transportation and the same would have been handled by the defendant in such a manner that defendant would not have suffered loss."

7. The Court erred in holding that it was necessary that there should be such a wilful concealment on the part of the shipper as to make the act a fraud per se, because under the provisions of the Interstate Commerce Act, the obtaining of preferences from a carrier is not limited to fraudulent schemes or devices or to those operating only by dishonest, underhand methods, but under the terms
48 of said Interstate Commerce Act the device used for obtaining such preferences need not necessarily be fraudulent, but includes anything which is a plan or a contrivance and the all-embracing prohibition against directly or indirectly charging less than the published rate shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. Armour Packing Company vs. United States, 209 U. S., 428; 52 Law. Ed. 681.

8. The Court erred in holding that the evidence does not show that Jacobson & Bro. personally knew how the receipt was filled out or to what Company the package was delivered.

(*a.*) Because the uncontradicted evidence of the witness, David Fischer, was as follows:

"It is true that the firm of A. Jacobson & Bro. kept on hand a Wells Fargo & Company's book containing express receipts and that when a package is to be shipped our company fills out the blank form of receipt in this book and the driver of the express company calls at our place of business and when receiving said package, receipts the book in a column opposite the entries made out for said package." (Tr. page 14.)

(*b.*) Because A. Jacobson & Bro. were chargeable with notice of the acts of their shipping clerk, David Fischer, and his act, om*m*ission or failure to ascertain and pay the legally established rate would, under the provisions of the Interstate Commerce Act, be deemed to be an act, omission or failure of the shipper, A. Jacobson & Bro. (Section 1, Paragraph 2, Elkins Act).

9. The court erred in considering the rule of the company requiring their agents to ask shipper to declare value for the following reasons:

49 (*a.*) Because the plaintiff had not plead or shown that he relied upon any rule in this respect.

(*b.*) Because a failure on the part of the driver of the Express Company to ask the shipper to declare the true value of the package would not excuse the shipper from ascertaining and paying the legally established rates. (Sec. 10, paragraph 3, Interstate Commerce Act.)

(*c.*) Because under the uncontradicted evidence and the finding of the Court, the facts disclosed that said rule was not in force as between the appellant and appellee, but had given way to a custom by which the shippers made out their own receipts and presented them to the appellant's driver merely to obtain his signature and that

under such custom it was the duty of the shipper to fill out and declare in the face of said receipt the true value of the shipment. It was further shown that the shipper had full knowledge of such custom and knew that a failure on his part to declare the true value would result in the package being shipped and a rate applied and fixed and entered in the way-bill as if the package were of the value of $50.00, and that in case the true value was declared to be more than $50.00 by the shipper, that an increased rate would be charged, based upon such additional valuation.

For the above reasons we insist that the rule requiring the driver to give a receipt and ask the shipper to declare the value was not in force and would not apply to the shipment in question and the Court therefore erred in holding that it did.

10. The Court erred in holding that there was no merit in the defense that the voluntary payment of the full value of the furs by appellant Express Company would subject appellant to prosecution for violation of Interstate Commerce Act, the voluntary payment by a carrier to a shipper of a greater amount than formed the
50 basis for the rate of transportation would be an undue preference, rebate, draw-back, etc., prohibited by the provisions of said Act.

11. The Court erred in affirming the judgment of the lower Court and in adjudging that the appellant should pay to appellee the full value of the furs, for the reason that it was shown that the basis for the rate of transportation of said furs from New York City to Dallas was only $50.00 and the payment by appellant to appellee of the sum of Four Hundred Dollars, ($400.00) which is a greater amount than that which formed the basis for the rate of transportation, would be a violation of the Interstate Commerce Act, and the judgment of this Court seeks to force the appellant herein to commit an act which, if voluntarily committed by it, would be a violation of the criminal laws of the United States.

12. The Court, having found that "the shippers kept on hand a book of blank receipts of the appellant and knew the custom that in the absence of a valuation a package would be carried at a rate as of the value of $50.00, and that if the value of the package was greater than $50.00 the rate would be increased accordingly," erred in not holding that the failure of the shippers, its agents and servants, to correctly declare the value of said package in said receipt amounted to the shippers knowingly and wilfully, by false billing, false classification, false representation as to the contents of the package, or by other means or device obtaining transportation for such property at less than the legal rate then established and in force, which is prohibited by Sec. 10, paragraph 3, Interstate Commerce Act.

13. The Court erred in not holding that the appellees were estopped from claiming a greater amount than formed the basis for the rate of transportation, because it was shown that the acts and omissions of the shippers misled the appellant and caused
51 appellant to relax its vigilance for the safety of the package and caused appellant to apply to and charge for said ship-

ment a less rate than that provided by tariffs duly established as required by law.

14. Under the uncontradicted evidence, as disclosed by the record and as found by the Court in its opinion rendered herein, the Court erred in not reversing the judgment of the lower court and rendering judgment herein for appellant.

Wherefore, appellant prays that upon consideration of this motion that this Honorable Court grant the same and set aside its opinion and judgment rendered herein on, to-wit, the 5th day of February, 1910, and grant to this appellant a rehearing, and upon such rehearing the judgment of the lower court be reversed and here rendered for appellant and for general relief.

ALEXANDER & HOGSETT,
Attorneys for Appellant.

Filed in Court of Civil Appeals Feb. 19th, 1910, Geo. W. Blair, Clerk 5th District.

5143/5997.

WELLS, FARGO & CO.
vs.
NEIMAN-MARCUS CO.

SATURDAY, *February 26th*, 1910.

Order of Court of Civil Appeals Overruling Appellant's Motion for Rehearing.

This day came on to be heard the motion of appellant for rehearing of this cause and the same being inspected, it is considered, adjudged and ordered that the said motion be overruled.

52 *Petition for Writ of Error.*

Filed 16th Day of March, 1910.

In the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas.

WELLS, FARGO & COMPANY et al.
vs.
NEIMAN-MARCUS COMPANY.

Petition for Writ of Error to Supreme Court of the United States.

To the Honorable Anson Rainey, Chief Justice:

Your petitioners, Wells Fargo & Company, a corporation, and G. H. Pittman and E. J. Riley, show that heretofore, on, to-wit, January 23rd, 1909, there was tried in the County Court at Law of Dallas

County, Texas, a case in which Neiman-Marcus Company, a corporation, was plaintiff and Wells Fargo & Company, a corporation, was defendant, said suit being numbered and styled on the docket of said Court No. 14918, Neiman-Marcus Company vs. Wells Fargo & Company.

The declaration of the said Neiman-Marcus Company, plaintiff in said cause, was a petition for the recovery of damages against Wells Fargo & Company, defendant, for the loss of a valuable package of furs shipped by A. Jacobson & Brother, of New York City, to plaintiff, at Dallas, Texas.

It was alleged by plaintiff, Neiman-Marcus Company, that the defendant, Wells Fargo & Company, was a common carrier of merchandise for hire and engaged in carrying on what is known as an express business from points to points within the United States. That the defendant, Wells Fargo & Company, as such carrier, was engaged in the transportation of interstate commerce for hire. That A. Jacobson & Brother, a firm of merchants of New York City, sold to the plaintiff, Neiman-Marcus Company, and delivered to the defendant, Wells Fargo & Company, for transportation from New York City to Dallas, Texas, one set of special Russian Sable furs
53 of the value of Five Hundred Dollars ($500.00). That the
defendant, Wells, Fargo & Company, in violation of its contract and duty, failed to transport and deliver said merchandise and had never delivered or tendered the same to plaintiff, Neiman-Marcus Company, but had converted the same and failed and refused to account to plaintiff for the same, to plaintiff's damage in the sum of Five Hundred Dollars ($500.00).

The defendant, Wells Fargo & Company, answered by general demurrer and general denial, and specially plead that said package of furs were delivered to defendant, Wells Fargo & Company, on August 28, 1907, by A. Jacobson & Brother, a firm of merchants doing business in the City of New York. That said shippers, A. Jacobson & Brother, were thoroughly familiar with the rules and regulations of express companies in regard to the carriage of packages intrusted to said companies, and from time to time shipped large quantities of merchandise by express from their place of business to various points in the United States. That said shippers, A. Jacobson & Brother, kept on hand at their place of business what is known as an express company's receipt book, in which they listed each and every package of merchandise delivered by them to the defendant for shipment. That the shippers, A. Jacobson & Brother, themselves filled out the receipt contained in said express book and when the driver of defendant would call at their place of business for the purpose of accepting said package for transportation over the lines of the defendant, Wells Fargo & Company, said book was presented to the driver with the receipt already made out therein and the driver's signature taken as a receipt for the package therein described. That upon the occasion of the shipment of the package in question, defendant's driver called at the place of business of the said A. Jacobson
54 & Brother and the package in question was there delivered to
him and said receipt book, with the receipt already filled out

by the shippers, was presented to said driver by the shippers and his signature obtained to said receipt. That at the time the package was delivered to said driver the same was securely packed in a box and wrapped with heavy paper and bound with strong twine, and the contents of said package was thereby wholly undisclosed and the defendant could not, from observation, ascertain the kind or character of shipment or the class, quality or value of the same.

Defendant, Wells Fargo & Company, further plead that the receipt filled out by the shippers, A. Jacobson & Brother, contained the following provision: "That in no event shall the defendant be held liable beyond the sum of $50.00 at not exceeding which sum the property is hereby valued, unless a different value is hereinabove stated." That in said receipt, prepared by said shippers, A. Jacobson & Brother, as aforesaid, no valuation whatever was declared on said package except the stipulation in said receipt, and that the defendant, Wells Fargo & Company, accepted said package in good faith, believing the same to be of the value of $50.00 or less, and that said package was shipped out over the defendant's, Wells Fargo & Company, lines and a charge made for such transportation based upon a package of the value of $50.00.

Defendant, Wells Fargo & Company, further plead that it was usual and customary with all express companies operating within the United States, and was usual and customary with the defendant company, that where no valuation is declared upon a package by the shipper to estimate the value thereof as being $50.00 or less, and was usual and customary for defendant company and all other express companies, as aforesaid, to base their charges for transportation, where a package is delivered without its value being declared by the shipper, upon an estimated value of $50.00 and that said
55 rule and custom was well known to the shippers, A. Jacobson & Brother, at the time the package in question was delivered to the defendant, Wells Fargo & Company for transportation.

Defendant, Wells, Fargo & Company, further plead that it was well known by the shippers, A. Jacobson & Brother, that if no valuation of the package were declared in said receipt that the same would be accepted by the defendant Express Company and carried over its lines as if the same was of the value of $50.00 or less and a regular established rate applying to a package of the value of $50.00 would be charged for transporting the same. That said shippers, A. Jacobson & Brother, also knew that if they declared the value of said package to be greater than $50.00 that they would have to pay an additional rate upon such excessive value over and above $50.00.

Defendant, Well, Fargo & Company, further plead that at the time it accepted the package for carriage between said points there was in force a legally established rate between said points, in that defendant had promulgated, published, posted and filed with the Interstate Commerce Commission, as required by law, tariffs, setting out and fixing rates to be charged by the defendant, Wells, Fargo & Company, for the carriage of merchandise packages of the kind, character, quality and value of that delivered to this defendant as aforesaid.

Defendant, Wells, Fargo & Company, further represented to the

court that under said tariffs aforesaid it was authorized to charge and did charge for the transportation of a package of the kind, weight and character of the above package, where the valuation was fixed thereon at the sum of $50.00, a rate of $1.00 between said points, but had the actual value of said package been known to the defendant, or had the shippers declared the actual value thereon to
56 be the sum of $500.00, as is now claimed, defendant, under the legally established tariffs, would have been compelled to charge for the transportation of said package between said points an additional sum based upon the excessive value of said package over and above said $50.00 of, to-wit, fifteen cents for each $100 value or fraction thereof, and had the shippers declared the value of said package to be the sum of $500.00, defendant, Wells, Fargo & Company, would have been compelled, under said tariffs, to make an additional charge of, to-wit, seventy five cents in addition to that agreed to be paid by the shippers. Defendant Wells, Fargo & Company, plead that said package was accepted by it and shipped out under a valuation of $50.00 and a rate applied to the shipment of said package as if the same were of the value of $50.00.

Defendant, Wells, Fargo & Company, further plead that it was well known to said shippers that where the value of the package shipped over defendant's line was in excess of $50.00 that an additional charge would be made to the shipper therefor, based upon such excessive value, and that said shippers did knowingly and wilfully falsely bill and classify said package and did misrepresent to the defendant, Wells, Fargo & Company, the value of said package and did, by concealment, prevent defendant from knowing the value of said package, whereby said shippers did obtain transportation of said property at less than the regular rates then established and in force on defendant's line of transportation, all of which was unknown to the defendant and which was done without the knowledge of the defendant as to the value of said goods.

Defendant, Wells, Fargo & Company, further plead that if it should at this time voluntarily recognize in settlement with the plaintiff or should be required by the court to pay to the plaintiff
57 a sum of money greater than the value of the package which formed the basis for the rate charged by defendant for transporting said package from New York to Dallas, that the defendant, Wells, Fargo & Company, would be guilty of directly or indirectly by special rate, rebate, drawback or other device of charging, collecting and receiving from plaintiff a less compensation for the service rendered in transportation of said package than it charges, demands, collects and receives from other persons for doing for them a like and contemporaneous service in the transportation of merchandise of a like kind and value of the package claimed to have been lost, and that defendant would be guilty of giving to plaintiff an undue and unreasonable preference and advantage over other persons or corporations shipping merchandise over the lines of this defendant.

Defendant, Wells, Fargo & Company, further plead that if it should voluntarily pay to plaintiff, or should the court require the defendant to pay to plaintiff, a greater sum of money than the value

of said package, which formed the basis for the rate of transportation, that the defendant, Wells, Fargo & Company, would be guilty of charging, demanding, collecting and receiving a less or different rate of compensation for such transportation of said property between the points heretofore mentioned than the rates, fares and charges which are specified in tariffs duly promulgated, published, posted and filed with the Interstate Commerce Commission as required by law, and which were in full force and effect at the time it accepted said package for shipment and would result in defendant refunding and remitting to the plaintiff a portion of the rates, fares and charges and extending to plaintiff privileges contrary to the provisions and stipulations in said tariffs contained.

58 Defendant, Wells, Fargo & Company, further plead that should it voluntarily recognize in settlement with the plaintiff or should the court force defendant to pay to the plaintiff a sum greater than the value of the goods which formed the basis for the rate, that said act, if committed voluntarily by the defendant, would be an offense against the laws of Congress and if performed under a judgment of the court, would, in effect, result in the court's requiring the defendant to do an act which, if committed voluntarily, would be an offense against the penal laws of the United States.

Upon the trial of said cause in said County Court at Law a judgment was rendered in favor of Neiman-Marcus Company, defendant in error, for the sum of Four Hundred and no/100 ($400.00) Dollars, together with interest thereon at the rate of 6% per annum from September 1, 1907, and all costs of suit, and thereupon the case was regularly appealed to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, which said Court, after hearing said cause, rendered a judgment and decree affirming the judgment of the County Court at Law of Dallas County, Texas, against Wells, Fargo & Company, plaintiff in error herein, and rendered judgment against the said Wells, Fargo & Company, a corporation, and G. H. Pittman and E. J. Riley, sureties on the appeal bond of the said Wells, Fargo & Company, for the sum of Four Hundred Dollars, together with 6% interest from Sept. 1st, 1907, and all costs of suit.

Your petitioner, Wells, Fargo & Company, filed a motion for rehearing in said Court of Civil Appeals in due time and in due form, which said motion was by said Court of Civil Appeals on, to-wit, the 26th. day of February, 1910, in all things overruled. Whereupon the said judgment of the Court of Civil Appeals for the 5th. Supreme Judicial District of Texas, at Dallas, which is the highest
59 court of law or equity in said State of Texas in which a decision in said suit could be had, became and is final.

Petitioners show that upon the trial of said cause in the County Court at Law of Dallas County, Texas, and in the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, there were presented to and insisted upon in said Courts certain Federal questions, to-wit:

First.

The judgment of the County Court at Law of Dallas County and the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, was and is erroneous in that it requires your petitioner, Wells, Fargo & Company, to pay to defendant in error, Neiman-Marcus Company, a greater value for an article of freight, lost in transit, than the value of said article, which formed the basis for the regularly established interstate rate of transportation which was applied to said shipment. Thereby requiring your petitioner, Wells, Fargo & Company, to transport said article of freight at a different and less rate than the regularly established interstate tariff rate, which acts, if committed voluntarily by your petitioner, Wells, Fargo & Company, would be contrary to and in violation of the Acts of Congress regulating interstate commerce.

Second.

The judgment of the County Court at Law of Dallas County, Texas, and of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, was and is erroneous in that it requires your petitioner, Wells, Fargo & Company, to pay to defendant in error, Neiman-Marcus Company, a greater sum of money as the value of the article of freight lost in interstate shipment than the value of said article which formed the basis for the regular interstate tariff rate of transportation assessed against and applied
60 to said shipment. Thereby requiring your petitioner, Wells Fargo & Company, to give to defendant in error an undue and unreasonable preference and advantage over other persons or corporations shipping merchandise over the lines of your petitioner and refunding and remitting to defendant in error a portion of the rates, fares and charges and of extending to defendant in error privileges contrary to the provisions and stipulations in said tariffs contained, and thereby requiring your petitioner, Wells Fargo & Company, directly or indirectly, by special rate, rebate, draw-back or other device, to charge, collect and receive from the defendant in error a less compensation for the service rendered in the transportation of said package than it charges, demands, collects and receives from other persons for doing for them a like and contemporaneous service in the transportation of merchandise of a like kind and value of the package claimed to have been lost, all of which acts, if committed by the petitioner, Wells, Fargo & Company, voluntarily, would be in violation of the Acts of Congress regulating interstate commerce.

Third.

The judgment of the County Court at Law of Dallas County and of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas was and is erroneous in that it requires your petitioner, Wells, Fargo & Company, to pay to defendant in error, Neiman-Marcus Company, a greater amount than the value of the article of freight lost in interstate shipment, than that which formed the basis

for the regular interstate tariff rate for transportation assessed against and applied to said shipment, thereby requiring your petitioner, Wells, Fargo & Company, to extend to defendant in error an undue and unreasonable preference and advantage over other persons or corporations shipping merchandise over the lines of your petitioner, Wells Fargo & Company, and thereby requiring
61 your petitioner, Wells Fargo & Company, to commit an act which would result in your petitioner, Wells Fargo & Company, remitting to defendant in error a portion of the rates, fares and charges and extending to defendant in error privileges contrary to the provisions and stipulations in said tariffs contained in requiring your petitioner, Wells Fargo & Company, to transport said article of freight at a different and less rate than the regularly established interstate tariff rate. By reason whereof your petitioner, Wells, Fargo & Company, will be deprived of its rights, privileges and immunities provided by the Acts of Congress regulating interstate commerce.

Petitioners further show that the Federal questions were presented and insisted upon in this cause, as hereinabove set out, and that the judgment of the County Court at Law of Dallas County and of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, were against your petitioner, Wells Fargo & Company, said courts holding that your petitioner, Wells Fargo & Company, had no rights, privileges and immunities by reason of the premises under the Acts of Congress regulating interstate commerce, but nevertheless there was in said suit and in the decisions of the County Court at Law of Dallas County and the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, drawn in question the construction and application of the laws of Congress regulating interstate commerce and the question of the right of said Courts to require your petitioner, Wells Fargo & Company, to commit an act in violation of the laws of Congress regulating interstate commerce, as well as the rights, privileges and immunities of your petitioner, Wells Fargo & Company, claimed thereunder by virtue of the premises, and your petitioners represent that a decision of the Federal questions was necessary to the
62 judgment rendered therein, which said judgment was adverse to your petitioner, Wells Fargo & Company.

Petitioners represent that they are aggrieved by said judgment and the proceedings in said suit and that in said judgment and proceedings in said cause manifest errors were committed to the prejudice of your petitioners, because they say that there was in said suit drawn in question the Federal questions above set out and that the decisions of the above named Courts were against your petitioners and denied to your petitioners the rights, privileges and immunities specially set up and claimed by virtue of said Federal questions, as will more fully appear from the record in said suit.

Your petitioners refer to the assignment of errors filed herewith and pray that the same may be considered for the purpose of this petition as a part hereof and further pray that writ of error may be

allowed and issue herein to the Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, which now has the record in said cause, for removal of said cause to the Supreme Court of the United States to the end that the errors in said judgment and proceedings in said cause may be duly corrected and fully and speedy justice done to the parties aforesaid in this behalf and that the transcript of the record, proceedings and papers in said cause, duly authenticated, may be sent up to the Supreme Court of the United States. Petitioners further pray for an order fixing the amount of bond for supersedeas in said cause and for such other orders and process as may cause said errors to be corrected by the said Supreme Court of the United States.

CHAS. W. STOCKTON AND
ALEXANDER, HOGSETT & GRESHAM,
Attorneys for Wells, Fargo & Co. et al.

63 The writ of error as prayed for in the foregoing petition is hereby allowed on this the 16th day of March, A. D. 1910, the writ of error to operate as a supersedeas and the bond for that purpose fixed at the sum of Two Thousand Dollars.

Dated at Dallas, Texas, this 16th day of March, A. D. 1910.

ANSON RAINEY,
Chief Justice Court of Civil Appeals for the 5th Supreme Judicial District of Texas, at Dallas.

No. —. Wells Fargo & Co., et al., Plaintiffs in Error, vs. Neiman-Marcus Company, Defendant in Error. Petition for Writ of Error. Filed in Court of Civil Appeals Mar. 16, 1910, Geo. W. Blair, Clerk 5th District.

64 In the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas.

WELLS, FARGO & COMPANY et al., Plaintiffs in Error,
vs.
NEIMAN-MARCUS COMPANY, Defendant in Error.

Assignment of Errors.

Now come Wells Fargo & Company and G. H. Pittman and E. J. Riley, plaintiffs in error, and respectfully submit that in the records, proceedings, decision and final judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, in the above entitled matter, there was and is manifest error in this, to-wit:

First.

Said judgment and order requires your petitioner, Wells Fargo & Company, to pay to defendant in error, Neiman-Marcus Company, a greater amount for an article of freight lost in transit than the

value of said article, which formed the basis for the regularly established interstate rate of transportation which was assessed against and applied to said shipment, thereby requiring your petitioner, Wells Fargo & Company, to transport said article of freight at a different and less rate than the regularly established interstate tariff rate, which said acts, if voluntarily committed by your petitioner, Wells Fargo & Company, would be in violation of the Acts of Congress regulating interstate commerce.

Second.

Said judgment and order requires your petitioner, Wells Fargo & Company, to pay to defendant in error, Neiman-Marcus Company, a greater amount as the value of an article of freight lost in interstate shipment than the value of said article, which formed the basis for the regular interstate tariff rate of transportation
65 assessed against and applied to said shipment, thereby requiring your petitioner, Wells Fargo & Company, to give to defendant in error, Neiman-Marcus Company, an undue and unreasonable preference and advantage over other persons or corporations shipping merchandise over the lines of your petitioner, Wells Fargo & Company, and refunding and remitting to defendant in error, Neiman-Marcus Company, a portion of the rates, fares and charges, and of extending to defendant in error privileges contrary to the provisions and stipulations in said tariffs contained. Which said acts, if committed by your petitioner, Wells Fargo & Company, voluntarily, would be in violation of the Acts of Congress regulating interstate commerce.

Third.

Said judgment requires your petitioner, Wells Fargo & Company, to pay to defendant in error, Neiman-Marcus Company, a greater sum of money as the value of the article of freight lost in interstate shipment than the value of said article, which formed the basis for the regular interstate tariff rate of transportation assessed against and applied to said shipment, thereby requiring your petitioner, Wells Fargo & Company, directly or indirectly, by special rate, rebate, draw-back or other devise, to charge, collect and receive from defendant in error a less compensation for the service rendered in the transportation of said package than it charges, demands, collects and receives from other persons or corporations for doing for them a like and contemporaneous service in the transportation of merchandise of a like kind and value of the package claimed to have been lost, which said act if committed by your petitioner, Wells Fargo & Company, voluntarily, would be in violation of the Acts of Congress regulating interstate commerce.

66

Fourth.

Said judgment requires your petitioner, Wells Fargo & Company, to pay to defendant in error, Neiman-Marcus Company, a greater sum of money as the value of the articles of freight lost in interstate

shipment than that which formed the basis for the regular interstate tariff rate of transportation assessed against and applied to said shipment, thereby requiring your petitioner, Wells Fargo & Company, to extend to defendant in error, Neiman-Marcus Company, an undue and unreasonable preference and advantage over other persons or corporations shipping merchandise over the lines of your petitioner, Wells Fargo & Company, and thereby requiring your petitioner, Wells Fargo & Company, to commit an act which would result in your petitioner, Wells Fargo & Company, remitting to defendant in error, Neiman-Marcus Company, a portion of the rates, fares and charges and extending to defendant in error, Neiman-Marcus Company, privileges contrary to the provisions and stipulations in said tariffs contained, and in requiring your petitioner, Wells Fargo & Company, to transport said article of freight at a different and less rate than the regularly established interstate tariff rate. By reason whereof your petitioner, Wells Fargo & Company, will be deprived of its rights, privileges and immunities provided by the Acts of Congress regulating interstate commerce.

Wherefore, plaintiffs in error pray that the judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, be reversed and said cause be remanded for such other proceedings as law and justice may require.

CHAS. W. STOCKTON AND
ALEXANDER, HOGSETT & GRESHAM,
Attorneys for Wells, Fargo & Co., et al., Plaintiffs in Error.

67 No. —, Wells Fargo & Co., et al., Plaintiffs in Error, vs. Neiman-Marcus Company, Defendant in Error. Assignment of Errors. Filed in Court of Civil Appeals Mar. 16, 1910. Geo. W. Blair, Clerk 5th District.

In the Court of Civil Appeals, Fifth Supreme Judicial District of Texas, at Dallas.

WELLS-FARGO & COMPANY et als., Plaintiffs in Error,
vs.
NEIMAN-MARCUS COMPANY, Defendant in Error.

Writ of Error Bond.

Know all men by these presents:

That we, Wells Fargo & Company, a corporation, and G. H. Pittman and E. J. Riley, as principals, and United States Fidelity & Guaranty Co. of Maryland, as surety, are held and firmly bound unto Neiman-Marcus Company, a corporation, in full and just sum of Two Thousand ($2,000.00) and no/100 Dollars to be paid to the said Neiman-Marcus Company, its successors or assigns, for which payment well and truly to be made we bind ourselves and each of

us and each of our successors, heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 16th day of March, 1910.

Whereas, lately, at a term of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, in a suit pending in said court between Wells Fargo & Company, appellant, and Neiman-Marcus Company, appellee, a judgment was rendered against said Wells Fargo & Company and against G. H. Pittman and E. J. Riley, sureties on its appeal bond, and the said Wells Fargo & Company and the said G. H. Pittman and E. J. Riley, having obtained a writ of error and filed a copy thereof in the Clerk's office of said Court to reverse the said judgment in
68 the aforesaid suit, and a citation to the said Neiman-Marcus Company citing and admonishing it to be and appear at the Supreme Court of the United States to be holden at Washington within thirty (30) days from date hereof.

Now, the condition of the above obligation is such that if the said Wells Fargo & Company and G. H. Pittman and E. J. Riley shall prosecute their writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and effect.

[SEAL.] WELLS-FARGO & COMPANY,
By CHAS. W. STOCKTON & ALEXANDER,
HOGSETT & GRESHAM,
Its Attorneys of Record.

[SEAL.] G. H. PITTMAN,
By CHAS. W. STOCKTON & ALEXANDER,
HOGSETT & GRESHAM,
His Attorneys of Record.

[SEAL.] E. J. RILEY,
By CHAS. W. STOCKTON & ALEXANDER,
HOGSETT & GRESHAM,
His Attorneys of Record.

[SEAL.] UNITED STATES FIDELITY AND GUARANTY COMPANY OF MARYLAND,
By W. L. LEEDS, *Attorney-in-Fact.*

Approved:

ANSON RAINEY,
Chief Justice of the Court of Civil Appeals,
Fifth Supreme Judicial District of Texas,
at Dallas.

No. —. Wells, Fargo & Co. et al., Plaintiffs in Error, vs. Neiman-Marcus & Company, Defendant in Error. Writ of Error Bond. Filed in Court of Civil Appeals, Mar. 16, 1910. Geo. W. Blair, Clerk 5th District.

69 In the Court of Civil Appeals, Fifth Supreme Judicial District of Texas, at Dallas.

WELLS-FARGO & COMPANY et al., Plaintiffs in Error,

vs.

NEIMAN-MARCUS COMPANY, Defendant in Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, before you, or some of you, being the highest Court of Law or Equity in the said State of Texas in which a decision could be had in the said suit between Wells Fargo & Company and G. H. Pitman and E. J. Riley, plaintiffs in error, and Neiman-Marcus Company, defendant in error, wherein was drawn in question the right of said Courts of the State of Texas to require, by its judgment, plaintiffs in error to commit an act which, if committed by them voluntarily, would be in violation of the acts of Congress regulating interstate commerce, and wherein a right, privilege and immunity was claimed by plaintiffs in error under the Acts of Congress regulating interstate commerce, and the decision was against plaintiffs in error and the rights, privileges and immunities specially set up and claimed under the Acts of Congress regulating interstate commerce, manifest error hath happened to the great damage of the said Wells Fargo & Company and G. H. Pittman and E. J. Riley, plaintiffs in error, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid with all things concerning the same, to the Supreme
70 Court of the United States, together with this writ, so that
you have the same at Washington within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, this 16th day of March, in the year of our Lord, 1910.

[The Seal of the U. S. Circuit Court, Northern Dist. of Texas, Dallas.]

LOUIS C. MAYNARD,
Clerk of the United States Circuit Court for the Northern District of Texas,
By GEO. W. MITCHELL, *Deputy.*

Allowed by—
ANSON RAINEY,
Chief Justice Court of Civil Appeals, 5th Supreme Judicial District of Texas, at Dallas.

I hereby certify that a copy of this writ of error is on this 16" day of March, 1910, lodged and filed in the office of the Clerk of the Court of Civil Appeals, Fifth Supreme Judicial District of Texas, at Dallas, for the defendant in error.

[Seal Court of Civil Appeals of the State of Texas.]

GEO. W. BLAIR,
Clerk Court of Civil Appeals, 5th Supreme Judicial District of Texas, at Dallas.

[Endorsed:] No. —. Wells Fargo & Co. et al., Plaintiffs in Error, vs. Neiman-Marcus Company, Defendant in Error. Original writ of error. Filed in Court of Civil Appeals Mar. 16, 1910. Geo. W. Blair, Clerk 5th District.

71 In the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas.

WELLS FARGO & COMPANY et al., Plaintiffs in Error,
vs.
NEIMAN-MARCUS COMPANY, Defendant in Error.

To Neiman-Marcus Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty (30) days from the date hereon, pursuant to a writ of error filed in the Clerk's office of the Court of Civil Appeals Fifth Supreme Judicial District of Texas, at Dallas, wherein Wells Fargo & Company, a corporation, and G. H. Pittman and E. J. Riley are plaintiffs in error and Neiman-Marcus Company is defendant in error, and show cause, if any there be, why judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness the Honorable Anson Rainey, Chief Justice, Court of

Civil Appeals, Fifth Supreme Judicial District of Texas, at Dallas, this 16th day of March, A. D., 1910.

ANSON RAINEY,
Chief Justice, Court of Civil Appeals, 5th Supreme Judicial District of Texas, at Dallas.

[Seal Court of Civil Appeals of the State of Texas.]

Attest:
GEO. W. BLAIR,
Clerk of the Court of Civil Appeals, 5th Supreme Judicial District of Texas, at Dallas.

Due service of the above and foregoing citation in error hereby acknowledged by the defendant in error this 16th day of March, A. D., 1910.

NEIMAN-MARCUS COMPANY,
By SPENCE, KNIGHT, BAKER & HARRIS,
Its Attorneys of Record.

Attest with the Seal of the United States Circuit Court for
72 the Northern District of Texas, at Dallas, this 16th day of
March, A. D., 1910.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

LOUIS C. MAYNARD,
Clerk of the United States Circuit Court, Northern District of Texas,
By GEO. W. MITCHELL, *Deputy.*

[Endorsed:] No. —. Wells Fargo & Co., et al., Plaintiffs in Error, vs. Neiman-Marcus Company, Defendant in Error. Original Citation in Error. Filed in Court of Civil Appeals Mar. 16, 1910. Geo. W. Blair, Clerk 5th District.

73 5997.

WELLS FARGO & COMPANY
vs.
NEIMAN-MARCUS COMPANY.

Bill of Costs Accrued in Court of Civil Appeals.

Filing Record	$ .50
Docketing Cause	.50
Entering Appearances	1.00
Filing Briefs	.80
Filing and Entering Motion	.35
Entering Orders	2.00
Issuing Notices	3.00
Filing Extra Papers	1.40

Entering Continuance	.20
Entering Judgment	1.00
Taxing Costs	.50
Mandate	1.50
Record Opinion	1.45
Copy of Opinion	.90
Certified Bill of Costs	1.00
Citation and copy	1.50
Making transcript	21.60
	$39.20

Paid by Appellant Wells Fargo & Co. this 24th day of March, 1910.

GEO. W. BLAIR, *Clerk.*

74 Clerk's Office, Court of Civil Appeals, Fifth Supreme Judicial District of Texas, at Dallas.

I, George W. Blair, Clerk of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, hereby certify that the foregoing 73 pages, except pages 69, 70, 71 and 72, contain a true and correct copy of a transcript of the record of all the proceedings had in the County Court at Law of Dallas County, Texas, and in the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas as the same appears of record and on file in this office in Cause No. 5997, Wells Fargo & Company, Appellant, vs. Neiman-Marcus Company, Appellee. I further certify that the pages herein numbered 69 and 70 is the original writ of error, of which a copy has been lodged and is now on file in this office, and that the pages numbered 71 and 72 is the original citation in error.

In testimony whereof I hereunto affix my signature, with the seal of the Court of Civil Appeals, Fifth Supreme Judicial District of Texas, at Dallas, this 22nd. day of March, A. D. 1910.

[Seal Court of Civil Appeals of the State of Texas.]

GEO. W. BLAIR,
Clerk Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas.

Endorsed on cover: File No. 22,091. Texas, Court of Civil Appeals, 5th Supreme Judicial District. Term No. 248. Wells, Fargo & Company and G. H. Pittman and E. J. Riley, plaintiffs in error, vs. Neiman-Marcus Company. Filed April 7th, 1910. File No. 22,091.

/3

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 29.

WELLS FARGO & COMPANY ET AL.,
Plaintiffs in Error,

against

NEIMAN-MARCUS COMPANY,
Defendant in Error.

ERROR TO THE CIRCUIT COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS.

BRIEF FOR PLAINTIFFS IN ERROR.

CHARLES W. PIERSON,
WILLIAM W. GREEN,
Of Counsel for Plaintiffs in Error.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

Supreme Court of the United States,

OCTOBER TERM 1912.

No. 29.

WELLS FARGO & COMPANY *et al.*, Plaintiffs in Error, AGAINST NEIMAN-MARCUS COMPANY, Defendant in Error.	

ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS.

BRIEF FOR PLAINTIFF IN ERROR.

The questions involved in this case are similar to those raised in Adams Express Co. *v.* Croninger, No. 18, which was argued at the last term, ordered for reargument and assigned for October 15, 1912.

To avoid repetition, in view of the elaborate arguments and briefs in that case (which we ask to have considered in connection with this case also) we confine ourselves in this brief to a single line of argument.

STATEMENT OF THE CASE.

Plaintiff in error (defendant below) is a common carrier. The petition alleges that on or about August 28, 1910, A. Jacobson & Bro. of New York City, sold to plaintiff (defendant in error here) and delivered to defendant for transportation and delivery to plaintiff, at Dallas, Texas, a set of Special Russian Sable Furs of the reasonable value of $500. That defendant accepted said articles and as a common carrier became bound to safely carry the same, and promised and agreed, for a valuable consideration, to transport the same expeditiously and safely and deliver the same to plaintiff in good order at Dallas, Texas, and that the same were never delivered (Record, pp. 1-2).

The answer alleges in substance, among other things, that the package was shipped under a special contract or express receipt which contained a stipulation that "in no event shall the defendant be held liable beyond the sum of $50., at not exceeding which sum the property is hereby valued, unless a different value is hereinabove stated." That said receipt was filled out by the shippers, (in what is known as an express company's receipt book kept at their place of business) and presented to the carrier for signature along with the package of furs. That in the receipt so presented by the shippers no different value was stated than the $50 aforesaid. That the package when delivered to defendant was packed in a box, wrapped with heavy paper and wound with strong twine, so that the defendant could not from observation ascertain the

kind or character of shipment or its value. That the defendant accepted the package in good faith, believing it to be of the value of \$50. or less, and made a charge for transportation based upon such value. That at the time it accepted the package for carriage, defendant had promulgated, published, posted and filed with the Interstate Commerce Commission, as required by law, tariffs showing the rates to be charged for the transportation of merchandise from New York to Dallas. That under said tariffs the charge for transportation from New York to Dallas, of a package of the weight of the package in suit (6-1/4 lbs.) valued at not over \$50. was \$1.00 which was the charge actually made by defendant. That had the actual value of the package been declared or been known to the defendant it would have been entitled under said tariffs to charge an additonal sum, based upon the excess value of the package over and above \$50., viz.: fifteen cents for each \$100. value. That had the shippers notified the defendant of the character and value of the shipment, the defendant would have made such additional charge, and in consideration thereof would have billed it out under special billing and given to it extra care and protection, which in all probability would have prevented its loss. That the act of the shippers in shipping the package under the receipt or contract in question without disclosing its true value resulted in their obtaining transportation at less than the regular rates, contrary to the provisions of the Interstate Commerce law (See Answer, pp. 2-6).

On the trial plaintiff put in evidence the express receipt or special contract and proved the shipment and non-delivery of the goods and that the same were worth \$400. (pp. 8-12). The defendant put in evidence the way bill and its published tariffs to substantiate the allegations of the answer with respect to the rate charged and the lawful rate (pp. 16-19).

The case was tried before the court, a jury being waived, and judgment rendered for the plaintiff for \$400. the value of the package, with interest and costs (p. 21). Defendant (plaintiff in error here) thereupon appealed to the Court of Civil Appeals, where the judgment below was affirmed (pp. 22-29). Plaintiff in error thereupon filed a motion for re-hearing which was overruled (pp. 30-35) and thereafter sued out a writ of error to this court (p. 35 *et seq.*).

ASSIGNMENT OF ERRORS.

The petition for writ of error and the assignment of errors is found at pages 35-44 of the Record. The error assigned and stated in various forms, is, briefly, that the judgment below enforces a preference in favor of defendant in error over other shippers, in violation of the Acts of Congress regulating Interstate Commerce.

EXTRACTS FROM THE INTERSTATE COMMERCE ACTS.

The Act to Regulate Commerce approved February 4, 1887, as amended by the Act of June 29, 1906, c.

3591, 34 Stat. 584, and in force at the time the transaction in this case occurred, provided in section one that "the term common carrier, as used in this Act, shall include express companies."

Section 2 reads:

> "That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Section 3 in part provides:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 6 in part provides:

> "That every common carrier subject to the provisions of this Act shall file with the Com-

mission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route.

* * * * * *

"No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs; * * *"

Section 10 in part provides:

"Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this Act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of

the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offence was committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court."

Section 20 in part provides:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be re-

quired to pay to the owners of such property, as may be evidenced by any receipt, judgment or transcript thereof."

Section one of the Act of February 19, 1903, c. 708, 32 Stat. 847, entitled "An Act to further regulate commerce with foreign nations and among the States," commonly known as the Elkins Act, as amended by section two of the Act of June 29, 1906, c. 3591, 34 Stat. 584, provides in part that:

"The willful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction, etc., * * * and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce, and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or disrcimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemanor, and on conviction thereof, etc., * * *."

"* * * Whenever any carrier files with

the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereof or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act."

ARGUMENT.

I.

THE CASE WAS TRIED BELOW ON THE THEORY OF A BREACH OF CONTRACT AND MUST THEREFORE BE DETERMINED IN THIS COURT ON THE SAME THEORY.

The petition set forth a cause of action for breach of contract. It alleged (pp. 1-2) that defendant accepted the goods for transportation "and promised and agreed for a valuable consideration, to transport the same expeditiously and safely and deliver the same to plaintiff in good order at Dallas, Texas. * * *

"That in violation of its contract and duty in the premises the defendant wholly failed to so transport and deliver said merchandise, and has never delivered nor tendered same to plaintiff," etc.

While the petition contained other allegations suitable to an action for negligence or an action for con-

version, plaintiff, by putting in evidence (p. 9) the express receipt or special contract (pp. 12-13), must be held to have elected to proceed on the theory of a breach of contract. On no other theory was the express receipt relevant or material evidence for plaintiff. It was not necessary in order to prove delivery of the goods to the carrier, because such delivery was expressly admitted by the answer (see answer, subdivision 3rd, pp. 2-3); nor was it material or relevant to a cause of action for negligence or conversion.

That the case was determined by the court below on the theory of a breach of contract appears from the following extract from the opinion (Record, p. 29):

> "In failing to deliver the package which it *agreed* to transport and deliver, it *breached its contract* and thereby became liable for the full value of the articles it failed to deliver" (italics ours).

Having elected to try the case on one theory, a litigant is restricted to the same theory on appeal. This rule is too well established to require discussion or citation of authorities. It is illustrated in the recent case in this court of Texas & Pacific Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S., 426. There, as in the case at bar, the carrier was seeking to reverse the judgment of a Texas court on the ground that it failed to give effect to the Interstate Commerce Act. After trying the case and obtaining judgment on the hypothesis that the rate involved was one of a lawful schedule, duly filed and published in accordance with the Interstate Commerce

Act, the shipper raised the point in this court that the facts found did not justify this conclusion. This court, however, disregarded the point and reversed the judgment, holding, as stated in the head note:

> "Where the state court determined a case involving railroad rates on the hypothesis conceded by counsel on both sides that the rate was one of a lawful schedule duly filed and published in accordance with the Interstate Commerce Act, the contention that the rate was not so filed and published and, therefore, was not a legal rate, is not open in this court."

II.

THE CONTRACT UPON WHICH PLAINTIFF SUED AND WAS PERMITTED TO RECOVER INVOLVED A VIOLATION OF THE ELKINS ACT. THE CONTRACT THEREFORE WAS INVALID AND NO ACTION CAN BE MAINTAINED FOR A BREACH THEREOF.

The contract is contained in the express receipt, read in connection with the company's published tariffs of which plaintiff must be deemed to have had knowledge. In substance, it was a contract to carry and deliver a certain package weighing 6-1/4 lbs. for a carriage charge of $1.00, being the rate applicable to goods valued at not exceeding $50. The goods however (as claimed by plaintiff and found by the Texas Court) were actually worth $400., though this fact was unknown to the carrier, and the stipulation in the receipt restricting the carrier's liability to $50. was void

as matter of law in Texas (p. 29). The one dollar rate therefore involved a preference or discrimination. The lawful carriage charge for the package under the circumstances would have been fifteen cents additional for each $100. of value or $1.60 (see Tariff, pp. 18-19).

The shipper, not the carrier, was responsible for this discrimination. The express receipt was filled out and tendered for signature by the shipper (Record, p. 10) who must be deemed to have been acting as plaintiff's agent in the matter (McMillan *v.* R. R. Co., 16 Mich., 79). The shipper knew that by delivering the package to the carrier under the circumstances disclosed, a rate would be obtained applicable to a package of the value of $50. whereas if the true value of the package had been disclosed the carrier would have charged a higher rate (Record, p. 11). Under these circumstances, it is clear that plaintiff obtained an advantage over other shippers and procured its package to be carried at less than the tariff rate within the meaning of the acts regulating interstate commerce. The Elkins Act provides:

> "It shall be unlawful for any person, persons or corporation to offer, grant or give, or to solicit, accept or receive any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier."

In *Chicago & Alton R. R. Co. v. Kirby*, 225 U. S., 155, the carrier was sued on the theory of a breach of contract, the contract there involved being a special contract for prompt delivery by a specified train. The Supreme Court of Illinois sustained a judgment in favor of the shipper. This Court however reversed the judgment and held that relief must be denied on the ground that the contract sued upon involved a discrimination, and as such a violation of the Elkins Act. Mr. Justice Lurton said (at p. 165), quoting from Armour Packing Co. *v.* United States, 209 U. S., 57, 72,

> "The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published."

Justice Lurton continued:

> "The broad purpose of the Commerce Act was to compel the establishment of reasonable rates and their uniform application. That purpose would be defeated if sanction be given to a special contract by which any such advantage is given to a particular shipper as that contracted for by the defendant in error."

Ellison v. *Adams Express Co.*, 245 Ill., 410, is a case squarely in point. Two packages, each worth considerably over \$50., were delivered to the Express Company for carriage from Philadelphia to Chicago under receipts containing a limitation of the carrier's liability to \$50. unless a greater value was declared. As in the case at bar the receipts were filled out by the shipper, who knew that the rate charged would be based upon the valuation, and refrained from declaring a greater value. Had the true value of the packages been stated, the transportation charges under the carrier's published tariffs would have been increased forty cents and thirty cents respectively. The packages having been lost, plaintiff brought suit against the carrier and recovered judgment for their full value. The Supreme Court of Illinois reversed this judgment on the ground that it was founded upon a contract in violation of the Interstate Commerce Act. In the course of the opinion the court said:

> "Courts of justice will not assist parties who have participated in a transaction forbidden by statute to assert rights growing out of it. There can be no right of recovery upon a contract which is against good morals, forbidden by law or opposed to public policy. The law will not lend its aid to enforce a demand having its origin in a breach of the law itself."
>
> * * * * * *
>
> "The general rule is undoubted which was stated by Lord Mansfield in the case of Holman *v.* Johnson, Cowp., 341: 'The principle of public policy is this: *Ex dolo malo non oritur actio.* No court will lend its aid to a man who founds

his cause of action upon an immoral or illegal act.' No person who has participated in a transaction forbidden by statute will be allowed to assert rights growing out of it. 'Whether the form of action is in contract or in tort, the test in each case is whether, when all the facts are disclosed, the action appears to be founded in a violation of law, in which the plaintiff has taken part' (Hall v. Corcoran, 107 Mass.. 251)."

* * * * * *

"The appellees' action, when all the facts are disclosed, is founded upon a contract knowingly entered into in violation of law. Whatever the form of action, whether in contract or tort, it had its basis in the contract of carriage. The wrong complained of is the breach of the illegal contract by which the appellees put their property into the possession of the appellant. That contract was not only a fraud on the appellant, but an intentional evasion of the Interstate Commerce Act, one object of which is to prevent discrimination in the transportation of property between the states. That act requires every carrier subject to its provisions to charge each shipper the same sum for a like and contemporaneous service. It makes unlawful the giving or the receiving of any rebate, concession or discrimination in respect of the transportation of property in interstate commerce by any carrier, whereby such property shall be transported at a less rate than that named in the tariffs published and filed by the carrier. To secure the purposes for which the act was adopted it is made unlawful, as we have seen, and is punishable by fine and imprisonment, for any person, with or without the consent or connivance of the carrier, to obtain transportation for his property at less than the regular rate. There is nothing in the act which indicates an

intent to limit the scope of this prohibition to the exaction of the penalty, leaving the contract binding in favor of the party who has knowingly and willfully obtained it against the prohibition of the act. Nor in the subject-matter of the legislation do we find anything to justify a presumption that Congress intended to relieve wrongdoers of the ordinary effect of their acts. Compliance with the requirements of the act by the shipper as well as the carrier is essential to its successful operation, and we cannot presume that Congress intended that the contracts forbidden by it should be valid and should be enforced to the same extent as if there were no prohibition, merely subjecting the offender to the penalty if detected and prosecuted. We see no reason which excepts this case from the rule that a contract entered into in violation of an express statutory prohibition cannot be made the basis of an action in a court of justice."

III.

THERE IS NOTHING IN THE CASE OF PENNSYLVANIA RAILROAD COMPANY *v.* HUGHES, 191 U. S., 477, INCONSISTENT WITH THE POSITION ABOVE TAKEN.

The point upon which we are insisting (viz. the invalidity under the Elkins Act of the contract sued upon) was not raised in the Hughes case and could not have been raised, because the Elkins Act had not then been enacted. The bill of lading in the Hughes case bore date August 10, 1900. The Elkins Act dates from 1903.

In the Hughes case it was held that no federal question was presented. The present case, of course, presents a federal question, viz.: the construction and effect of the Elkins Act.

IV.

FOR THE REASONS ABOVE SET FORTH, AS WELL AS THOSE DISCUSSED IN THE ARGUMENTS AND BRIEFS IN THE CASE OF ADAMS EXPRESS COMPANY *v.* CRONINGER, NO. 18, THE JUDGMENT SHOULD BE REVERSED.

CHARLES W. PIERSON,
WILLIAM W. GREEN,
Of Counsel for Plaintiffs in Error.

IN THE

Supreme Court of the United States

October Term, 1912

No. 29

WELLS FARGO & COMPANY,
Plaintiff in Error,

vs.

NEIMAN-MARCUS COMPANY,
Defendant in Error.

ERROR TO THE COUNTY COURT OF DALLAS COUNTY AT LAW, DALLAS COUNTY, TEXAS

RHODES S. BAKER,
SPENCE, KNIGHT, BAKER & HARRIS,
Attorneys for Defendant in Error.

STATEMENT OF THE CASE.

The plaintiff in error has not favored us with its brief in this case, leaving it incumbent upon us to present the case in full instead of availing ourselves of any correct presentation of the facts that might have been disclosed in its brief.

Neiman-Marcus Company is a corporation domiciled in Dallas. Wells Fargo & Company is a corporation engaged as a common carrier of express matter over lines of railway. In particular it has lines of railway over which it does through business between New York City and Dallas, Texas. In July, 1907, Mr. A. L. Neiman bought from A. Jacobson & Bro., wholesale dealers in furs, in the City of New York, a set of Russian sable furs worth Four Hundred Dollars. These furs were made up in the establishment of A. Jacobson & Bro., and came into the charge of one David Fisher, a shipping clerk in the employ of A. Jacobson & Bro., to be sent by express to Neiman-Marcus at Dallas, Texas, charges collect. They were delivered to the Express Company, which undertook to transport the same, but negligently carried them, by reason whereof they were lost in transit, probably at Paris, Texas, or between Paris and Dallas, Texas, and were never delivered to consignee.

For the value of the furs Neiman-Marcus Company sued Wells Fargo & Company, and obtained judgment in the sum of Four Hundred Dollars with interest at the rate of six per centum from September 1, 1907.

From that judgment Wells Fargo & Company prosecuted an appeal to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas. On that appeal the judgment of the court below was affirmed. Motion for rehearing was duly presented and overruled, and thereupon Wells Fargo & Company applied for and obtained writ of error to this Court.

The plaintiff's petition sets up no special contract on the part of the carrier as the basis for its liability, but charges the carrier as a public fuctionary with the duty of using due care in the handling of the merchandise. It is charged that Wells Fargo & Company negligently and carelessly handled the merchandise and converted the same to its own use, and upon demand made has failed and refused to deliver it to the defendant in error.

The defenses urged in the State court were in substance:

(1) That by reason of the provisions of the laws then in force relating to interstate commerce, and which were designed to secure equality among shippers, no liability could be predicated against plaintiff in error, it having accepted the merchandise under circumstances which required its transportation at rates based upon a limitation of liability of fifty dollars, instead of at a rate based upon its true value.

(2) That independent of the interstate commerce act the circumstances attending the delivery of the merchandise to the Express Company were such as to estop the defendant in error from demanding compensation in excess of fifty dollars.

The facts are simple. The person making the shipment at New York consigned to Neiman-Marcus Company at Dallas, Texas, was David Fisher. He was shipping clerk for A. Jacobson & Bro., and to him the package of furs was given for shipment. One of his subordinates delivered the package to the agent of the Express Company in his presence. A receipt which will be mentioned later herein was taken. The merchandise was to be sent *with its charges to be collected at destination.* No negotiations were had with respect to a contract of shipment. No inquiry was made of the agent of the Express Company respecting the rate of shipment, and no representation concerning the rate was made by any one. No inquiry or representation was made by or to the agent of the Express Company concerning the value of the merchandise, and no statement, true or false, concerning the value was made. Nothing was said concerning a limitation of liability on the part of the Express Company to fifty dollars, nor was it suggested that there existed a schedule of charges whereunder merchandise valued at fifty dollars or less was carried at rates different from merchandise of a higher value. The shipper

handling the transaction (David Fisher) testifies that he did not know at the time the package was delivered to the Express Company about the rules as to diverse rates upon diverse valuations, nor that the package, if marked or stated to be worth four hundred dollars, would be charged for at a rate higher than if carried where no valuation at all was declared thereon.

It appears that A. Jacobson himself had knowledge of some of the rules of the Express Company whereunder it charged higher rates for valuable merchandise than it did for merchandise valued at fifty dollars or less, but it is affirmatively shown that A. Jacobson had no personal connection with or agency relationship to the shipment.

There was no proof offered on behalf of the Express Company showing how it carried this particular package of merchandise, nor what care was taken in its transportation, nor that it neglected it because of its supposition that its value was under fifty dollars, nor, indeed, that it supposed that its value was less than fifty dollars. It inferentially appears from the way bills introduced in evidence that the package was carried as far as Paris, Texas, and either lost there or between that point and Dallas, Texas.

The receipt which was given by the agent of the Express Company to David Fisher at the time of shipment contained the usual catalog of arbitrary and confessedly futile limitations upon the liability of the carrier, and, among other things:

> "Nor in any event shall said company be held liable beyond the sum of fifty dollars, at not exceeding which sum said property is hereby valued, unless a different value is hereinabove stated."

Referring to the sentence quoted from the Express Company's receipt in the preceding paragraph, the plaintiff in error in its brief in the State Court (page 12) expressly concedes:

"On the contrary, for the purposes of this case, we are willing to concede that such provision, in so far as it limits the liability of the company to fifty dollars, is void both under the Statutes of the State of Texas and under a provision of the Interstate Commerce Act commonly known as the 'Hepburn Bill.' The sole purpose for which said receipt is offered in evidence is to show that by virtue of the past dealings between the parties and by agreement, the responsibility of declaring the true value of the package rested upon the shipper, A. Jacobson & Bro., and that said shipper, under the terms and conditions of said receipt, and under the facts, must be held to have declared the value of said package to be the sum of fifty dollars."

I.

It being conceded that the limitation of liability contained in the receipt is void as such, and it appearing that no contract violative of the Interstate Commerce Act was ever made, the shipper's right to compensation for the value of the lost merchandise is unobstructed.

An important fact appearing in this case and not presented in any of the cases heretofore decided, is that, among the rules and regulations embraced in the tariffs filed by the Express Company with the Interstate Commerce Commission is one wherein the carrier itself assumes the duty of inquiring as to the value of merchandise tendered to it for shipment, thereby informing the shipper that the duty of declaring the value does not in the first instance rest upon him. See Classification sheet No. 17, page 3, containing instructions to agents, headed "Rules, 1. Subdivision A.:"

"Give a receipt of the prescribed form for all matters received. *Always ask shippers to declare the*

value, and when given insert it in the receipt, mark it on the package and enter amount on the way bill. If shippers refuse to state value write or stamp on the receipt *'value asked and not given.'*"

The interstate commerce acts require such rules to be embodied in the tariffs and make them obligatory upon the carrier.

The proof is uncontradicted that no value was asked for or declared; that no value was stated in the receipt, marked on the package, or entered on the way bill, and that no notation was made upon the receipt or elsewhere in the language of the rule, "value asked and not given." It is undisputed that the agent actually handling the shpiment on behalf of the defendant in error (David Fisher) was entirely innocent of any intentional concealment.

From these considerations it appears that the Express Company assumed but failed to perform the duty of ascertaining the value of the shipment at the time of the commencement of the transportation. However, inasmuch as no misleading notation appears upon the receipt or on the package or in the way bill to the effect that the value had been ascertained, it is to be presumed that the Express Company would belatedly comply with the duty it had assumed, at the time of the delivery of the package and the collection of the charges thereon, and that upon making such inquiry and ascertaining the true value, it would collect from the consignee such lawful charges.

In the opinion disposing of these issues in the Court of Civil Appeals (Wells Fargo & Company vs. Neiman-Marcus Company, 125 S. W. 614), the Court say:

> "The law never presumes fraud, and under the evidence it is just as fair to presume that value was never thought of at the time and that the shipper never intended to conceal value from the Express

Company. *The Express Company's agent failed to perform a plain duty,—that is, he failed to have the shipper declare the value, and failing in this duty, we are of the opinion that the company is in no attitude to complain that the shipper did not state the value.* In any event, it was a question for determination, and the trial court was justified, under the evidence, in finding against the Express Company. It cannot require of a shipper the performance of a duty which was, at least, its plain duty to perform and which it failed to perform. In failing to deliver the package it had agreed to transport and deliver it breached its contract and thereby became liable for the full value of the articles it failed to deliver. The stipulation in the receipt attempting to restrict or limit its liability in the respect stated was contrary to law and is void."

The confession of the plaintiff in error that the clause attempting to limit liability to fifty dollars is void and that its only function in this case is to tend to show a false declaration of value on the part of the agent of the shipper eliminates from consideration every contention except the claim that the shipper has obtained a preferential contract contrary to the limitations of federal law. It is indispensable from the standpoint of plaintiff in error, that such a contract be established. The only effort made towards proving such a contract was in endeavoring to show that the carrier was granting and the shipper obtaining discriminatory and preferential treatment in the matter of rates upon this particular package. This position finds no support whatever in the evidence adduced.

If due regard were given to the facts adduced in the present record it would be impossible to sustain a charge that any attempt has been made to violate federal laws. It could not be charged in this case that the shipper had

wilfully concealed the facts contrary to a duty to declare them. It could not be charged that he had misrepresented the facts. It could not be charged that at the time of shipment a discriminatory rate had been agreed upon or contemplated, nor that such a rate had been agreed upon or collected at destination. Then, where is the illegality?

II.

In this case no federal question is fairly comprehended, either in the cause of action of the defendant in error or the grounds of defense of the plaintiff in error.

The case of the defendant in error requires no aid from the federal statutes. The relationship of shipper and carrier is established under the principles of general law. The federal statutes did not create the relationship, and did not purport to do so. Their aim was merely the regulation of existing institutions. Therefore, no federal question is presented by the defendant in error.

The defenses of the plaintiff in error are not so obviously outside of the federal statutes, *but when critically examined* are readily perceived so to be. The four assignments of error urged by it in this Court, when summarized, are found to embrace but one contention, viz:

That the judgment of the State Court is erroneous because by it the defendant in error is ordered (first) to pay a greater amount for the merchandise lost in transit than the value of said merchandise (second) as fixed by the rate of transportation which was assessed against and applied to said shipment, thereby requiring defendant in error (third) to violate the federal laws by (fourth) transporting the merchandise at a less rate than it fixed in its tariffs on file with the Interstate Commerce Commission.

This summary, when analyzed, is found to involve several contentions, but if it appears that these contentions are wholly unsupported by the evidence, no federal question is actually presented.

(1) *Does the judgment require the plaintiff in error to pay to Neiman-Marcus Company a greater amount than the value of the merchandise?* The contrary appears from the evidence. The only proof in the case is that the merchandise was worth four hundred dollars and that Neiman-Marcus Company bought it and paid for it on that basis.

(2) *Does the judgment require the plaintiff in error to pay for the merchandise a greater amount than its value as fixed by the rate of transportation assessed against it?* The conclusive answer to this contention is that no rate of transportation was assessed against this merchandise by the defendant in error. It is true that the rate of transportation is in a sense dependent upon declared valuations, but in this case no valuation was declared nor inquiry even made, and it may be fairly presumed that the carrier would have done its legal and voluntarily assumed duty at destination upon delivery of the merchandise to the consignee. It assessed no rate of transportation and placed no valuation upon the receipt, the package of merchandise, or the way bill.

(3) *Does the proof show that the defendant in error was required by the judgment to transport the merchandise in question at an illegal rate of transportation?* The judgment obviously makes no such requirement, either directly or indirectly. It does not deal with the matter of the rate of transportation at all, and the enforcement of the statutory obligation of the carrier to pay the value of this merchandise does not in anywise presuppose or assume that it has violated or intended to violate any acts of Congress or other statutory or extra-statutory laws binding upon it.

(4) *Does the judgment require the defendant in error to violate any acts of Congress regulating interstate commerce?* The acumen of the able attorneys for the plaintiff in error has not been equal to the task of pointing out any particular in which the enforcement of the judgment of the

State court would compel the defendant in error to violate any acts of Congress regulating interstate commerce. The judgment does not, either directly or indirectly, compel a departure from the tariff rates, or a discrimination in the matter of valuation. On the contrary, it enforces the statutory duty of the carrier to make settlement with the shipper upon a basis of actual values, without discount or immunity under the void and illegal exemptions in the receipt given to the shipper.

Pennsylvania Railroad Company vs. Hughes, 191 U. S., 477. This case involved the shipment of a race horse from a place in the State of New York to a destination in Pennsylvania. The shipping contract contained a limitation upon liability expressly therein declared to be based upon a smaller rate charged in consideration of the limited liability. The stipulation was valid under the laws of New York, where the contract was made, but invalid under the laws of Pennsylvania, and the courts of the latter state applied its own policy and rule of decision, awarding the plaintiff a recovery in excess of the limited valuation clause of the contract.

The court, after referring to the numerous objects sought to be accomplished by the interstate commerce acts, say:

> "While under these provisions it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight, and has prevented carriers from obstructing continuous shipments on interstate lines, we look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character limiting liabilty to stipulated valuations, and, until Congress shall legislate upon it, is there any valid objection to the state enforcing its own regulations upon the subject, although it may to this extent indirectly affect interstate commerce contracts of car-

riage? It is well settled that the state may make valid enactments in the exercise of its legislative power to promote the welfare and convenience of its citizens, although in their operation they may have an effect upon interstate traffic. We can see no difference in the application of the principle based upon the manner in which the state requires this degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in the state courts. The state has a right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, a contract to the contrary notwithstanding. This requirement in the case just cited is held not to be an unlawful attempt to regulate interstate commerce, in the absence of Congressional action providing a different measure of liability when contracts such as the one now before us are made in relation to interstate carriage. Its pertinence to the case under consideration renders further discussion unnecessary."

Kissenger vs. Fitzgerald, 152 N. C., 247. In this case, replying to a contention that "where property was shipped and freight paid on a lower valuation, to allow a recovery on a basis of a higher valuation would, in effect, be giving a preference in freight rates, contrary to the provisions of the federal laws requiring common carriers to publish a schedule of freight rates and make their charges accordingly; and for the shipper to insist on such a recovery, after having ascertained the published rates at which his property had been in fact shipped, would make him guilty of a criminal offense under the Federal laws," the court say:

"Just how a shipper, innocent at the time and entirely ignorant of any classification or difference

in rating, who ships a horse and pays the freight charged by the agent without being informed of the valuation made, or without knowing that any special valuation was made, should be held guilty of knowingly and wilfully committing a fraud and a criminal offense because he institutes an action for recovery for injuries done to the property by the carrier's negligence, and seeks to recover on the basis of its true value, we are utterly unable to perceive."

Texas & Pacific Railway Company vs. Mugg & Dryden, 202 U. S., 242. This decision holds that the lawful rates shown in tariffs on file with the Interstate Commerce Commission become automatically and by force of their own vigor, parts of any contract of carriage and thereby destroy even stipulations for a different rate. Quoting with approval the language of the Supreme Court of Alabama in a similar case, the court say:

> "The clear effect of the decision (referring to G. C. & S. F. Ry. Co. vs. Heffley, 158 U. S., 98) was to declare that one who has obtained from a common carrier the transportation of goods from one state to another at a rate, specified in the bill of lading, less than the published schedule rates filed with and approved by the Interstate Commerce Commission, and in force at the time, whether or not he knew that the rate obtained was less than the schedule rate, is not entitled to recover the goods, or damages for their detention, upon the tender of payment of the amount of charges named in the bill of lading, or of any sum less than the schedule charges. In other words, that whatever may be the rate agreed upon, the carrier's lien on the goods is, by force of the Act of Congress, for the amount fixed by the published schedule of rates and charges, and this lien can be discharged, and the consignee can become

entitled to the goods, only by the payment or tender of payment of such amount. Such is now the Supreme law, and by this and the courts of all other states are bound."

By virtue of this rule the lawful rate is read into the contract in question as effectively as if printed therein.

It must be apparent that the whole defense in this case depends upon the ability of the carrier to establish fraud on the part of the shipper. If fraud were shown it would be a defense, regardless of the Federal law. Nothing is added to the efficacy of the defense by attributing its value to Federal law. The courts of Texas give full recognition in proper case to the defense of fraud and the consequent estoppel that results therefrom.

Unfortunately for the plaintiff in error, however, the issue of fraud does not present a Federal question, and moreover, as a debatable issue here, has been foreclosed by the decision adverse to it in the state courts empowered to resolve issues of facts. Abundant justification exists under the applicable authorities. Southern Pacific Co. vs. Anderson (Texas Civil Appeals), 63 S. W., 102; International & G. N. Railroad Company vs. Van deVenter (Texas Civil Appeals), 107 S. W. 560; Pacific Express Company vs. Hertzberg (Texas Civil Appeals), 42 S. W. 795; Head vs. Pacific Express Company (Texas Civil Appeals), 126 S. W. 683; Bynum vs. Preston, 69 Texas, 291; St. L. S. W. Ry. Co. vs. McIntyre (Texas Civil Appeals), 82 S. W. 346.

In the case at bar confessedly there has been no false representation—no unlawful concealment. Neither the law nor the rules of the Express Company imposed upon David Fisher the duty to volunteer information about the value of the shipment in question when he was making no bargain as to rates and when the contents of the package of merchandise were not concealed from the carrier by some

artifice calculated to induce it to make no inquiry. By its rules published the carrier undertook the duty of making inquiry, and by its rules published, regardless of such inquiry, it was under the duty of collecting a fixed rate upon the merchandise pursuant to law. There having been no misrepresentation made, the charge of estoppel would fall, but that is not the only element lacking. It does not appear that Fisher had in mind that the carrier would, without further information, indulge in any assumption as to the value of the merchandise. Therefore, it cannot be said that he intended it should so act. On the contrary, it appears that he himself had no information as to the value of the merchandise and did not know that value was a material element in the transaction. It does not appear that the Express Company was misled into believing the property to be of not exceeding the minimum valuation. Its agent does not so testify, no such notation was made upon the receipt given, nor upon the package, nor upon the way bill, and nothing appears in the evidence indicating its purpose not to pursue the inquiry at destination. Lastly, it fails to appear that the carrier did, in fact, act upon any such misrepresentation, or that it did, in fact, sustain any injury.

We respectfully submit that the court did not err in entering judgment for the defendant in error for the amount claimed with interest, and that the judgment should be affirmed.

RHODES S. BAKER,
SPENCE, KNIGHT, BAKER & HARRIS,
Attorneys for Defendant in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1912

No. 29.

WELLS FARGO & COMPANY, Plaintiff in Error.	
vs.	
NEIMAN-MARCUS COMPANY, Defendant in Error.	

ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

To the HONORABLE, THE SUPREME COURT of the UNITED STATES:

Neiman-Marcus Company, defendant in error, tenders herewith, and respectfully prays leave to file in this cause, a certified copy of the Brief which was filed by the plaintiff in error in this case, in the Court of Civil Ap-

peals for the Fifth Supreme Judicial District of Texas. Quotations were made from this Brief in the original brief of the defendant in error in this Court, but since the filing of the brief defendant in error has for the first time been furnished a copy of the Transcript of Record, and the Brief of plaintiff in error in this Court, and believes that this Court will be aided in its consideration of this cause by having before it the Brief of plaintiff in error in the State Court.

Petitioned further prays for leave to file its supplemental Brief herein, and in this connection shows that it has given notice of this motion by serving upon Charles W. Pierson and William W. Green, of counsel for plaintiff in error, two copies of this motion and the supplemental briefs tendered herewith.

Respectfully submitted,

RHODES S. BAKER,

SPENCE, KNIGHT, BAKER & HARRIS

Attorneys for Defendant in Error

Neiman-Marcus Company.

IN THE

Supreme Court of the United States

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WELLS FARGO & COMPANY,
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ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

SUPPLEMENTAL BRIEF.

RHODES S. BAKER,
SPENCE, KNIGHT, BAKER & HARRIS
Attorneys for Defendant in Error.

The Defendant in Error is advised that the Plaintiff in Error is contending or will contend that this cause is ruled by a decision just reached in this Court, wherein it

is held that contracts of Express Companies limiting their liability to nominal amounts, are valid.

We have had no opportunity to read the opinion of the Court in that case, but submit that the plaintiff in Error ought not to make such a contention in this case, for the following reasons:

1.

No Federal question based upon the supposed validity of the shipping contract in this case was insisted upon in the State Courts, but on the contrary that contention was expressly waived in those Courts, and the illegality of the contract conceded.

The plaintiff in error in its brief in the Court of Civil Appeals formally disclaimed any intent to assert that the receipt constituted a valid contract under either State or Federal law, using the following language:

> "*We wish it to be emphatically understood that we do not contend that appellant Express Company could limit its common law liability by a stipulation or provision in its receipt. The provision of the receipt set out in the above statement was not offered in evidence for the purpose of making any such contention. On the contrary, for the purpose of this case, we are willing to concede that said provision in so far as it limits the liabilities of the Company, for* $50.00, *is void both under the statutes of the State of Texas, and under the provisions of the Interstate Commerce Commission, commonly known as the Hepburn Bill.*"

We quoted this section from the brief of the plaintiff in error in our original brief in this Court, but did not particularly emphasize its pertinency for the reason that it had never been contended theretofore in this case that the receipt constituted a legal and binding contract.

With the permission of the Court, we are filing with this brief, a certified copy of the brief filed by plaintiff in error, in the Texas Courts. The quotation is taken from pages

2.

No issue upon the validity of the limitation of liability in the receipt was made in either of the State Courts and no Federal question postulating its validity was urged in said Courts, and therefore, no such issue can be urged in this Court, sitting as a Court of Review.

The original petition of the plaintiff charged the defendant with general liability as a carrier, independent of a special contract. (Tr. p. 1). The answer of the plaintiff in error in the State Court did not even assert the validity of the special stipulation limiting the liability. Its whole contention was that the presentation by the New York clerk of Jacobson & Brother to the agent of the Express Company of a receipt form which contained an attempted limitation of liability amounted to an estoppel against the defendant in error. Nowhere in that answer, is it asserted or urged that the special contract is valid under Federal or State law. The only Federal question urged in that answer is embedded in the

sixth, ninth, ten and eleventh paragraphs of the Answer, and in substance is to the effect that for plaintiff in error to pay to defendant in error the amount of its loss would amount to a discrimination in favor of defendant in error.

3.

The assignments of error filed by plaintiff in error in this Court, present only the Federal question of alleged discrimination and nowhere urge upon this Court, that the receipt constituted a valid contract under the Federal Laws, nor that plaintiff in error was denied any right based upon the validity of the contract under Federal Law.

By the first assignment it is urged that the effect of enforcement of the judgment below would be to require plaintiff in error to transport the article of freight in question at a less rate than the established tariff, and that such act would violate the Acts of Congress regulating commerce.

By the second assignment the idea of undue and unreasonable preference and discrimination is presented.

By the third assignment, another angle of the alleged discrimination is urged.

By the fourth assignment, still another angle of the same legal proposition is presented.

4.

The brief filed by plaintiff in error in this Court does not even contend that the receipt constituted a special contract, which was valid under Federal Laws, and does not urge upon this Court any such validity.

Plaintiff in error does not incorporate its assignments of error in the brief, but summarizes at page 4, in the following language:

> *"The error assigned and stated in various forms is briefly, that the judgment below enforces a preference in favor of defendant in error over other shippers, in violation of the Acts of Congress regulating interstate commerce."*

In this connection, we may fairly urge against plaintiff in error the very quotation from T. & P. Ry. Co. vs. Abilene Cotton Oil Company, 204 U. S. 426, as follows:

> *"Where the State Court determined a case involving railroad rates on the hypothesis conceded by the counsel on both sides, that the rate was one of a lawful schedule duly filed and published, etc., the contention that the rate was not so filed and published, and therefore was not a legal rate is not open in this Court."*

Paraphrasing this quotation, and bearing in mind that plaintiff in error is, itself seeking to make an issue in this Court, which it expressly waived in the State Court, it would read:

> *"Where the State Court determined a case involving the liability of an express company for*

lost merchandise, upon the hypothesis conceded by counsel on both sides, that a receipt in evidence was illegal and void under both State and Federal laws, a contention afterwards in this Court that the receipt was a valid contract is not open in this Court.".

REMARKS.

Unless the particular Federal question which is urged upon this Court was made in proper time in the State Court, it cannot be fairly urged in this Court that some right of the plaintiff in error arising under Federal laws was invoked by and denied to it in the State Courts.

Yet that is exactly what the plaintiff in error will accomplish in this case if it is permitted to urge and urge successfully, in this Court, for the first time in this litigation, that the receipt in evidence constituted a contract, which in its limitations of liability was valid under the Acts of Federal Congress regulating interstate commerce.

The case was tried upon no such theory by the State Court. The only contention made there was that conceding the illegality of the receipt as a contract the defendant in error was estopped to claim a value above $50.00 for the merchandise in question. That contention raised an issue of fact with which this Court has no concern, as it has been already determined in both of the local Courts. That issue of fact we have already discussed in our original brief filed here, and we have no disposition

to burden this Court with its further consideration.

There was no fraud on the part of defendant in error; there arises no estoppel against it, and it is now too late for the plaintiff in error, after exhausting its ingenuity and the hiding places of the law, to seek to sustain its appeal for the interposition of this Court by interposing for the first time a new contention, jurisdictional in its character.

The defendant respectfully prays as in its original brief, that the judgment of the local courts be affirmed.

RHODES S. BAKER,
SPENCE, KNIGHT, BAKER & HARRIS,
Attorneys for Defendant in Error
Neiman-Marcus Company.

based upon valuation. *Adams Express Co.* v. *Croninger*, 226 U. S. 491.

A statement filed in the case that a clause in a contract is void under a statute is a concession for purposes of argument as to a matter of law and cannot conclude anyone, as it does not operate to withdraw the contract from the case nor its validity from the court's consideration.

The reasonable and just consequence of misrepresentation of value to get the lower rate of shipment is not that the shipper recover nothing but that he is estopped to recover more than the value declared to obtain the rate.

A shipper by accepting a receipt reciting that the carrier is not to be held liable beyond a specified amount at which the property is thereby valued unless a different value than that is so stated, and thus obtaining a lower rate than that which he would have been obliged to pay had he declared the full value, declares and represents that the value does not exceed the specified amount.

There is no substantial distinction between a value stated on inquiry and one agreed upon or declared voluntarily.

THE facts, which involve the liability of an express company on goods of undeclared value and also the construction of the Carmack Amendment, are stated in the opinion.

Mr. Charles W. Pierson, with whom *Mr. William W. Green* was on the brief, for plaintiffs in error:

The case was tried below on the theory of a breach of contract and must therefore be determined in this court on the same theory. Having elected to try the case on one theory, a litigant is restricted to the same theory on appeal. *Tex. & Pac. Ry. Co.* v. *Abilene Oil Co.*, 204 U. S. 426.

The contract upon which plaintiff sued and was permitted to recover involved a violation of the Elkins Act. The contract therefore was invalid and no action can be maintained for a breach thereof.

The shipper, not the carrier, was responsible for this discrimination. The express receipt was filled out and tendered for signature by the shipper, who must be deemed

to have been acting as plaintiff's agent in the matter. *McMillan* v. *Railroad Co.,* 16 Michigan, 79; *Chicago & Alton R. R. Co.* v. *Kirby,* 225 U. S. 155; *Armour Packing Co.* v. *United States,* 209 U. S. 57, 72; *Ellison* v. *Adams Express Co.,* 245 Illinois, 410.

Nothing in the case of *Pennsylvania R. R. Co.* v. *Hughes,* 191 U. S. 477, is inconsistent with this position. In that case no Federal question was presented. The present case, of course, does present a Federal question: the construction and effect of the Elkins Act.

Mr. Rhodes S. Baker, for defendant in error, submitted:

It being conceded that the limitation of liability contained in the receipt is void as such, and it appearing that no contract violative of the Interstate Commerce Act was ever made, the shipper's right to compensation for the value of the lost merchandise is unobstructed.

In this case no Federal question is fairly comprehended, either in the cause of action of the defendant in error or the grounds of defense of the plaintiff in error.

The judgment does not require the plaintiff in error to pay a greater amount than the value of the merchandise. The contrary appears from the evidence.

The judgment does not require the plaintiff in error to pay for the merchandise a greater amount than its value as fixed by the rate of transportation assessed against it. No rate of transportation was assessed against this merchandise by the defendant in error. It is true that the rate of transportation is in a sense dependent upon declared valuations, but in this case no valuation was declared nor inquiry even made, and it may be fairly presumed that the carrier would have done its legal and voluntarily assumed duty at destination upon delivery of the merchandise to the consignee. It assessed no rate of transportation and placed no valuation upon the receipt, the package of merchandise, or the way bill.

The proof does not show that the defendant in error was required by the judgment to transport the merchandise in question at an illegal rate of transportation.

The judgment does not require the defendant in error to violate any acts of Congress regulating interstate commerce.

On the contrary, it enforces the statutory duty of the carrier to make settlement with the shipper upon a basis of actual values, without discount or immunity under the void and illegal exemptions in the receipt given to the shipper. See *Pennsylvania Railroad Company* v. *Hughes*, 191 U. S. 477; *Kissenger* v. *Fitzgerald*, 152 Nor. Car. 247.

Under *Tex. & Pac. Ry. Co.* v. *Mugg*, 202 U. S. 242, the lawful rate is read into the contract in question as effectively as if printed therein.

The whole defense in this case depends upon the ability of the carrier to establish fraud on the part of the shipper. If fraud were shown it would be a defense, regardless of the Federal law. Nothing is added to the efficacy of the defense by attributing its value to Federal law. The courts of Texas give full recognition in proper case to the defense of fraud and the consequent estoppel that results therefrom.

The issue of fraud does not present a Federal question, and moreover, as a debatable issue here, has been foreclosed by the decision adverse to it in the state courts empowered to resolve issues of fact. *Southern Pacific Co.* v. *Anderson*, 63 S. W. Rep. 102; *Int. & G. N. R. R. Co.* v. *Van deVenter*, 107 S. W. Rep. 560; *Pacific Exp. Co.* v. *Hertzberg*, 42 S. W. Rep. 795; *Head* v. *Pacific Exp. Co.*, 126 S. W. Rep. 683; *Bynum* v. *Preston*, 69 Texas, 291; *St. L. S. W. Ry. Co.* v. *McIntyre*, 82 S. W. Rep. 346.

Confessedly there has been no false representation—no unlawful concealment. Neither the law nor the rules of the express company imposed on the shipping clerk the duty to volunteer information about the value of the ship-

ment in question when he was making no bargain as to rates and when the contents of the package of merchandise were not concealed from the carrier by some artifice calculated to induce it to make no inquiry.

It does not appear that the express company was misled into believing the property to be of not exceeding the minimum valuation. Nothing appears in the evidence indicating its purpose not to pursue the inquiry at destination. It fails to appear that the carrier did, in fact, act upon any such misrepresentation, or that it did, in fact, sustain any injury.

MR. JUSTICE LURTON delivered the opinion of the court.

Action by a shipper against an express company to recover for the loss of a package of furs shipped from New York to Dallas, Texas, and never delivered.

The receipt executed by the express company contained a clause exempting it from loss or damage not due to its fraud or negligence, and providing that it should in no event be held liable "beyond the sum of fifty dollars, at not exceeding which sum said property is hereby valued, unless a different value is hereinabove stated." No different value was declared. The package weighed seven pounds. It contained furs enclosed in a paper box which was securely wrapped and tied with cord.

The defendants in error were permitted to prove that the actual value of the furs was four hundred dollars. That the consignors kept in their shipping office an express book containing blank express receipts. One of these was filled out in their office by their shipping clerk. When the wagon of the express company called at the office, the agent signed the receipt, and the package was delivered to him by a boy assistant to the shipping clerk. No questions were asked as to the value and no value declared other than as shown in the receipt. It was also shown

that the clerk who wrapped and marked the package did not know the value and had no actual knowledge of the graduated rates of the express company, and that he had had nothing to do with the selling or buying of the furs. One of the consignors, Abraham Jacobson, sold the furs personally and testified as to their value. He testified that he knew that if the value had been declared to be four hundred dollars, the express rate would have been higher, and that if no value was especially declared, they would be carried under the express rate applying to a package valued at not in excess of fifty dollars.

There was put in evidence the table of graduated rate sheets on file with the Interstate Commerce Commission. These showed that the rates were graduated by weight and value. The rate from New York to Dallas upon a package weighing between five and seven pounds and valued at not over fifty dollars was one dollar, which was the rate applicable to and charged upon the package in question. If the value had been declared at four hundred dollars, the rate would have been increased fifteen cents for each additional hundred dollars of value.

One of the provisions of the filed tariff sheets contained this direction, "Always ask shipper to declare the value, and when given insert it in the receipt, mark it on the package and enter amount on way bill. If shipper refuses to state value, write or stamp on the receipt, 'value asked and not given.'"

A jury was waived, and there was a judgment for the plaintiff below for the full value of the package.

The contract of shipment, including the clause for the limitation of any recovery in case of loss or negligence, is substantially like the contract upheld in *Adams Express Company* v. *Croninger*, 226 U. S. 491. To take this case without the controlling influence of that case counsel say that no Federal question based upon the validity of the shipping contract was raised in the state court, and

for this they rely upon a paragraph in the brief of one of the counsel for the express company filed in the court below in which it is said: "For the purpose of this case, we are willing to concede that said provision in so far as it limits the liabilities of the company for $50.00, is void both under a statute of the State of Texas," and under the provisions of the Carmack Amendment of § 20 of the act to regulate commerce of June 29, 1906.

That such a clause may be void under the legislation of Texas may be true. But that it is valid, if fairly made for the purpose of applying to the shipment the lower of the two rates based upon valuation, is not now an open question. *Adams Express Company* v. *Croninger*, cited above.

That case had not been decided when this case was heard in the state court, and there was much diversity of opinion as to the meaning of that section when counsel made the concession. At most it was a concession for purposes of argument as to a matter of law and could not conclude any one, since it did not operate to withdraw the shipping contract from the case, nor its validity from the court's consideration.

It is undoubtedly true that the principal defense upon which the defendants seem to have relied in the state court was, that by intentional misrepresentation the plaintiff had obtained a rate based upon a valuation of fifty dollars, and that they had thereby secured transportation of the property, for which they sue, at a less rate than that named in the tariffs published and filed by the carrier as required by the acts of Congress regulating commerce, and thus obtained an illegal advantage and caused an illegal discrimination forbidden by the acts referred to. But this defense rested upon the misrepresentation as to real value declared only in the carrier's receipt, and, therefore, involved the consequence of the undervaluation by which an unlawful rate had been obtained. The question at last would be shall the shipper or owner recover nothing

because of that misrepresentation, or only the valuation declared to obtain the rate upon which the goods were carried? The latter would seem to be the more reasonable and just consequence of the estoppel. The ground upon which the validity of a limitation upon a recovery for loss or damage due to negligence depends is that of estoppel.

But it is a mistake to assume that the company did not rely upon the stipulation limiting a recovery in case of loss or damage to the value agreed upon or declared. In the twelfth paragraph of its answer it asserted that if liable at all its liability "should be limited to $50.00, as provided in said contract of shipment, which $50.00 has heretofore been tendered to plaintiff." By its eighth and ninth assignments of error in the Court of Civil Appeals error was assigned upon the refusal of the trial court to hold that the defendants in error were estopped, by the valuation declared, to recover any amount in excess of $50.00. The Court of Civil Appeals, while not in express terms denying the validity of such a stipulation limiting recovery, did so in effect, for it seems to have placed its judgment of affirmance upon the rule requiring the company's agents to ask the shipper to declare the value and if no value is stated that the package should be stamped "value asked and not given." This was not done. Therefore, said the court, "the company's agent failed to perform a plain duty . . . . and it is in no attitude to complain that the shipper did not state the value."

But the shipper in accepting the receipt reciting that the company "is not to be held liable beyond the sum of fifty dollars, at not exceeding which sum said property is hereby valued, unless a different value is hereinabove stated," did declare and represent that the value did not exceed that sum, and did obtain a rate which he is to be assumed to have known was based upon that as the actual value. There is no substantial distinction between

a value stated upon inquiry, and one agreed upon or declared voluntarily. The rate of freight was based upon the valuation thus fixed, and the liability should not exceed the amount so made the rate basis. *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331, 338.

Judgment reversed and remanded for further proceedings not inconsistent with this opinion.

WELLS, FARGO & COMPANY *v.* NEIMAN-MARCUS COMPANY.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 29. Argued November 5, 1912.—Decided February 24, 1913.

Whether void or not under the state statute, a provision in an express receipt limiting recovery in case of loss or negligence, is valid as to interstate shipments under the Carmack Amendment if fairly made for the purpose of applying to the shipment the lower of two rates